(16,771.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 558.

JAMES W. WILSON, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH CAROLINA ON THE RELATION OF L. C. CALDWELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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1 CALDWELL v. WILSON. } Case No. 305.

From the supreme court of the State of North Carolina.

2 NORTH CAROLINA:

In Supreme Court, September Term, 1897.

STATE OF NORTH CAROLINA on Relation of L. C. CALDWELL *against* JAMES W. WILSON. } Petition for Writ of Error.

The above-named defendant, considering himself aggri-ved by the judgment and decision of the supreme court of North Carolina rendered December 23d, 1897, excepts to said judgment and decision and prays for a writ of error to the end that said judgment and decision may be inquired into by the Supreme Court of the United States and all errors found therein be reversed. Wherefore he prays that said writ of error be granted and a transcript of the record and proceedings and papers upon which said judgment and decision was rendered, duly authenticated, may be sent to the Supreme Court of the United States.

Raleigh, N. C., December 23d, 1897.

R. O. BURTON,
Attorney for J. W. Wilson.

3 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the judges of the supreme court of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit wherein The State of North Carolina on the relation of L. C. Caldwell is plaintiff and James W. Wilson is defendant, wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, a manifest error has happened, to the great damage of the said James W. Wilson, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States,

together with this writ, so that you have the same at Washington on the 20th day of January, 1898, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

4 Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 23d day of December, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-second.

[L. S.] N. J. RIDDICK,
Clerk of the Circuit Court of the United States for the Eastern District of North Carolina.

Allowed by—
W. T. FAIRCLOTH,
Chief Justice of the Supreme Court of North Carolina.

5 North Carolina Supreme Court, September Term, 1897.

STATE OF NORTH CAROLINA on Relation of L. C. CALDWELL
against
JAMES W. WILSON.

Assignment of Errors.

And now, on this 23d day of December, 1897, comes the defendant, James W. Wilson, plaintiff in error, by his attorney, Robert O. Burton, and says that in the record and proceedings in the above-entitled matter there is manifest error, in this, to wit:

First. That the supreme court erred in holding that the defendant was not removed or suspended from his office of railroad commissioner without due process of law and contrary to the fourteenth amendment to the Constitution of the United States.

Second. That the supreme court erred in holding that in the removal or suspension of the defendant he was not deprived of the equal protection of the laws, contrary to the fourteenth amendment to the Constitution of the United States.

Third. That it appears by the record in this case that the governor made certain charges against the defendant in his letter of August 24th, 1897, and cited him to appear before him on the first day of September, 1897, and show cause in writing and to make answer and proofs in writing and to be there in person or by counsel, at his election; that the defendant appeared and filed a written denial of all the charges and demanded to be confronted with his accusers and to hear and cross-examine the witnesses against him; that said demand was refused; that the facts were not in the personal knowledge of the governor, and that the governor, without evidence and without a trial, undertook to find generally that the defendant had violated the railroad commission law in some

6 of the particulars mentioned in his letter of August 24th, 1897, set out in the complaint, and that the defendant had not

only violated the said act in the specifications set out in the said act, but that he had otherwise within the meaning and intent and words of said act become disqualified to act, and thereupon the governor undertook to suspend or remove the defendant and deprive him of his office and appointed the relator, L. C. Caldwell, to fill the same; that defendant declined to surrender his office, and thereupon this action in the nature of *quo warranto* was brought to oust him therefrom; that in the superior court the defendant filed his answer, controverting all the charges made against him, and tendered issues covering all phases of the controversy; that the trial court refused to submit the issues or any issues to the jury, but ruled that the statute and the action of the governor did not deprive the defendant of his liberties and property without due process of law, and that the plaintiff was entitled to judgment for the possession of the office on the pleadings; that the defendant duly excepted and appealed to the supreme court, and the ruling and decision of the trial court was sustained and the judgment affirmed.

The defendant says said ruling and decision is erroneous and in violation of the fourteenth amendment to the Constitution of the United States.

Fourth. That the defendant is a judge of a court of record under the laws of North Carolina, and no judge or other officer is liable to removal or suspension by the governor. Moreover, the constitution of North Carolina, art. 4, sec. 30, confers the power of removal of judges on the General Assembly for mental and physical inability, which this defendant claims is a prohibition against removal by the governor or legislature for other causes. The supreme
7 court holds that by the action of the governor the defendant is not deprived of the equal protection of the laws, and the defendant says that the said ruling and decision are erroneous and in violation of the fourteenth amendment to the Constitution of the United States.

Wherefore the said James W. Wilson prays that the judgment of the supreme court of North Carolina be reversed.

Raleigh, N. C., December 23, 1897.

R. O. BURTON,
Defendant's Attorney.

8 UNITED STATES OF AMERICA, *ss:*

To the State of North Carolina and L. C. Caldwell, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the 20th day of January, 1898, pursuant to a writ of error filed in the clerk's office of the supreme court of North Carolina, wherein James W. Wilson is plaintiff in error and The State of North Carolina on relation of L. C. Caldwell is defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness William T. Faircloth, chief justice of the supreme court of North Carolina, this 23d day of December, 1897.

W. T. FAIRCLOTH,
Chief Justice of the Supreme Court of North Carolina.

The foregoing papers endorsed: Filed on Thursday, the 23rd day of December, 1897, at 7.10 p. m., in the supreme court of N. C. clerk's office, together with copies of the writ of error for the State of North Carolina and L. C. Caldwell, plaintiff relator.

9 In the Supreme Court of the United States.

JAMES W. WILSON, Plaintiff in Error,
against
THE STATE OF NORTH CAROLINA on Relation of L. C. CALDWELL, Defendant in Error.

I, O. J. Carroll, United States marshal for the eastern district of North Carolina, do hereby certify that on the 24th day of December, 1897, in my district aforesaid, I served the citation herein on L. C. Caldwell by delivering to him a true copy thereof, and on the 29th day of December, 1897, in my district aforesaid, I served said citation on the State of North Carolina by delivering a true copy thereof to Daniel L. Russell, governor of said State.

Witness O. J. Carroll, United States marshal for said district, this 29th day of December, 1897, in Raleigh, N. C.

O. J. CARROLL,
U. S. Marshal,
By J. C. CARROLL, *D. M.*

Fees, $4.00, paid by plaintiff in error.

10 [Endorsed:] J. W. Wilson *v.* The State of N. C. Marshal's certificate.

11 *Bond on Writ of Error.*

Know all men by these presents that we, James W. Wilson, as principal, and J. W. Wilson, Jr., A. E. Wilson, and J. S. Carr, as sureties, are held and firmly bound unto the State of North Carolina and L. C. Caldwell in the full and just sum of four thousand dollars, to be paid to the said State of North Carolina and L. C. Caldwell or either of them, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 6th day of December, 1897.

Whereas lately, at a term of the supreme court of North Carolina, in a suit depending in said court between The State of North Carolina on relation of L. C. Caldwell, as plaintiff, and James W. Wilson, as defendant, a judgment was rendered in favor of the plaintiff and against the defendant, and the said defendant, James W. Wilson,

having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation having issued, directed to the said plaintiffs, citing and admonishing them to be and appear at the Supreme Court of the United States, at Washington, on a day named in said citation: Now, the condition of the above obligation is such that if the said James W. Wilson shall prosecute said writ to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JAS. W. WILSON. [SEAL.]
J. W. WILSON, JR. [SEAL.]
A. E. WILSON. [SEAL.]
J. S. CARR. [SEAL.]

12 —— ——, being duly sworn, says that he is worth the sum of three thousand dollars over and above the amount of his homestead and personal property exemptions and his indebtedness.

J. W. WILSON, JR. [SEAL.]

Sworn to and subscribed before me this Dec. 6, 1897.

[Seal of Burke Superior Court.]

P. W. PATTON, *C. S. C.*

A. E. Wilson, being sworn, says that he is worth the sum of three thousand dollars over and above the amount of his homestead and personal property exemptions and his indebtedness.

A. E. WILSON.

Sworn to and subscribed before me this 10th day of December, 1897.

[Seal of the Notary.]

R. S. TRAVIS,
Notary Public.

J. S. Carr, being duly sworn, says that he is worth the sum of ten thousand dollars over and above his exemptions by law and his indebtedness.

J. S. CARR.

Sworn to and subscribed before me this December 14, 1897.

[Seal of the Notary.]

W. T. SMITH,
Notary Public.

Approved December 23, 1897.

W. T. FAIRCLOTH,
Chief Justice of North Carolina.

Endorsed: Bond filed on Thursday, Dec. 23, 1897, at 7.10 p. m., in the supreme court of N. C. clerk's office.

13 *Transcript of Record to Supreme Court of North Carolina.*

IREDELL COUNTY:

In the Superior Court.

STATE OF NORTH CAROLINA on the Relation of L. C. CALDWELL *against* JAMES W. WILSON. } Summons for Relief.

State of North Carolina to the sheriff of Burke county, Greeting:

You are hereby commanded to summon James W. Wilson, the defendant above named, if he be found within your county, to be and appear before the judge of our superior court, at the court to be held for the county of Iredell, at the court-house in Statesville on the 9th Monday after the 1st Monday of September, to wit: the 8th day of November, 1897, and answer the complaint, a copy of which is herewith served, and let said defendant take notice that if he fail to answer to the said complaint within that time, the plaintiff will apply to the court for the relief demanded in the complaint.

Hereof fail not, and of this summons make due return.

Given under my hand and seal of said court, this 5th day of October, 1897.

H. V. FURCHES,
Clerk of Superior Court, Iredell County.

STATE OF NORTH CAROLINA, *Iredell County.*

In the Superior Court.

STATE OF NORTH CAROLINA on the Relation of L. C. CALDWELL *against* JAMES W. WILSON. } Bond.

We acknowledge ourselves bound unto James W. Wilson, the defendant in this action, in the sum of two hundred dollars, to be *a* void, however, if the plaintiff, L. C. Caldwell, shall pay the defendant all such cost as the defendant may recover of the plaintiff in this action.

Witness our hands and seals, this 5th day of October, A. D. 1897.

L. C. CALDWELL. [SEAL.]
M. E. RAMSEY. [SEAL.]

M. E. Ramsey, being duly sworn, deposes and says that he is worth the sum of $200, over and above all debts, liabilities, homestead and personal exemptions.

M. E. RAMSEY.

Subscribed and sworn to before me October 5, 1897.

W. G. LEWIS, *J. P.*

Received October 9th, 1897. Served October 9th, 1897, by reading the within summons to James W. Wilson and delivering him a copy of the summons and complaint. Fee paid, $1.20.

THOMAS M. WEBB,
Sheriff Burke County.

NORTH CAROLINA, EXECUTIVE DEPARTMENT,
OFFICE OF THE ATTORNEY GENERAL,
RALEIGH, N. C., *Oct.* 4, 1897.

STATE on the Relation of L. C. CALDWELL
against
JAS. W. WILSON.

Application having been made to me by L. C. Caldwell for leave to bring an action in the name of the State upon the relation of the said L. C. Caldwell against Jas. W. Wilson, in the superior court of Iredell county and others to try the title to the office of railroad commissioner; and satisfactory security having been tendered me under section 608 of the Code to indemnify the State against
14 all costs and expenses which may occur in consequence of the bringing of such action:

Now, therefore, leave is hereby granted to the said applicant to bring the said action in the name of the State upon the relation of the said applicant against the said Jas. W. Wilson.

ZEB. V. WALSER,
Attorney General.

NORTH CAROLINA,
Iredell County.

Superior Court, November Term, 1897.

STATE OF NORTH CAROLINA on Relation of L. C. CALDWELL,
Railroad Commissioner,
vs.
JAMES W. WILSON.

Complaint.

The plaintiff complains and alleges:

1st. That the relator, L. C. Caldwell, is a citizen and tax-payer of Iredell county, North Carolina.

2nd. That the defendant was duly elected railroad commissioner by the legislature of 1893 for the term of six years from the time of his election until expiration of his term.

3rd. That as the relator is informed and believes *that* on the 24th day of August 1897 His Excellency Daniel L. Russell, governor of North Carolina, addressed and sent to the defendant James W. Wilson a communication in the following words and figures, to wit:

STATE OF NORTH CAROLINA,
EXECUTIVE DEPARTMENT,
RALEIGH, *Aug.* 24, 1897.

To James W. Wilson, Esq., member of the railroad commission of North Carolina.

SIR: By section first of the railroad commission act, ratified the 5th day of March, 1891, it is made the duty of the governor to suspend from office any railroad commissioner who shall be the holder of "any stock or bond of any railroad company, or be the agent or employee of any such company, or have any interest in any way in such company or in case any one of them shall be disqualified to act." It is alleged that you are the joint owner with Col. A. B. Andrews, the first vice-president of the Southern railroad, general political manager of the same for North Carolina, of a certain piece of hotel property known as Round Knob, situated on the line of the said railroad; that said hotel property is worth little or nothing except as a hotel and that it is worthless for this purpose except when designated and patronized by the Southern railroad as an eating-house for their passenger trains; that said hotel property has been unoccupied and unused for any purpose for several years past and has brought in no revenue to you as one of its owners; that it is impossible for you to use, rent or lease said property unless some understanding, agreement or contract could be made with the Southern Railroad Company to designate and patronize the said hotel as a railroad eating-house; that you and the other owner or owners of said hotel property have secured some agreement, understanding or contract from the Southern Railroad Company to abandon other eating-houses and designate Round Knob as an eating-house; and that by virture of said arrangements with said railroad that you have been able to lease said hotel property to S. Otho Wilson, or to his mother through the said Wilson, for profit.

It is further alleged that you have a son in the employment of the Southern Railroad Company at Morganton; that he was appointed to this place by the Southern Railroad Company at your request, and that he was appointed over others entitled to the place by promotion under the practice of the company, and that this was done for your accommodation and at your request.

These allegations have been made to me by many persons, and I think publication of them has been made in the public press. If they or the material substance of them be true—as to which I am expressing no opinion—then the questions to be determined are as follows:

First. Have you acquired any interest in any way in such company in violation of law?

Second. Have you become disqualified to act as a fair judge or commissioner?

Under the law the governor has not only a right but is required to suspend a railroad commissioner who commits a breach of the statute which has been cited, and this he may do, as in other cases of executive removals, without notice to the party interested; but

I shall not pass judgment or decide this matter until you have had a full opportunity to be heard by way of denial or explanation or justification or other defense. You will therefore please show cause in writing on or before Wednesday, the 1st day of September, 1897, at the executive office in Raleigh, why you should not be suspended from your said office and a report thereof made to the next General Assembly according to law. On the return day of this notice, you will please make answer and proofs in writing, and be there in person, or by counsel at your election.

DANIEL L. RUSSELL, *Governor.*

To which said James W. Wilson in obedience to said order made reply as follows:

"AUGUST 30TH, 1897.

To Daniel L. Russell, governor of North Carolina.

SIR: Your favor of the 25th, citing me to appear before you on Wednesday, the 1st day of September, and reply in writing to certain rumors or charges from parties unknown to me, and show cause why I should not be removed from the responsible position of chairman of the railroad commission, agreeable to section 1 of the act creating this commission, was duly received.

In obedience thereto I herewith submit this, my answer to each charge in the order as given in your letter. It is drawn by myself, and possibly free from the elegant diction which a lawyer would have imparted, but I feel sure it will carry conviction to an impartial mind.

1st. It is not true, as alleged, that I am the joint owner with Col. A. B. Andrews, vice-president of the Southern railway and general political manager of the same for North Carolina, in a certain piece of hotel property known as Round Knob.

2nd. It is not true that said hotel property is worthless for that purpose except when designated and patronized by the Southern Railway Company as an eating-house for their passenger trains.

3rd. It is not true that said hotel property has been unoccupied and unused for any purpose for several years past and brought in no revenue to me as one of its owners.

4th. It is not true that it was impossible to use, lease or rent said property unless some understanding, agreement or contract could be made with the Southern railway to designate and patronize the said hotel as a railroad eating-house.

5th. It is not true, as alleged that I with the other owner or owners of said property have secured an agreement, understanding or contract from the Southern Railway Company to abandon other eating-houses and designate Round Knob as an eating-house, and by virtue of said agreements with said railroad that I have been able to lease said hotel property to Otho Wilson, or his mother, through the said Wilson, for profit.

6th. It is untrue, as further alleged, that I have a son in the employment of the Southern Railway Company at my request and that he was appointed over others entitled to the place by promotion under the practice of the company, and this was done for my

accommodation and at my request. I hereby denounce these allegations as made to you by many persons as false, and demand the proof.

16 In explanation I will say that about 1881 Col. Andrews and myself built this hotel at a cost of about $8,000. It is not worthless, as stated, but is a most convenient and beautiful hotel, with thirty rooms, closets and baths on each floor, and was leased and run as a hotel for several years with no meals supplied to passengers. The property has not been unoccupied for years, as charged, but on the contrary was leased up to last year, at an annual rental of $500 per annum, to a responsible party, with no understanding of any kind with the Southern Railway Company.

In a casual conversation with Mr. Otho Wilson, my recollection is that I spoke of this very desirable property, which was then vacant, the lease of Friscard & Co. having expired, and saying that the superintendent of the road had sent me word that if some one would open and keep a good house he would make it a dinner-house; the hotel at Hickory was then closed, and my impression is that Asheville was not then a regular eating-house, but of this I am not sure. Mr. Wilson remarked that his mother was looking around for a boarding-house, and that possibly this might suit her, and he would go up and examine the property. This he did, and on his return expressed himself as greatly pleased, but said the former lessee had left the property in bad condition and very dirty. I was aware of this, and replied that, of this account, if his mother would put the place in good repair she could have it the first year free of rent—this much for the profit as charged; the message to me about the eating-house was not intended for Mr. Otho Wilson or his mother, but was sent before Mr. Wilson or his mother ever thought of it, or intended for any person I could get who would keep a first-class table. The management of the property was left entirely to me, and my recollection is that I never mentioned the matter to Col. Andrews until the trade was consummated through Mr. Otho Wilson for his mother.

The land upon which the Round Knob property was located belonged to John Malone, Col. Crockford and myself. This party owed a debt of about $3,000 to R. H. Brown, of McDowell county. I am the only one of the parties now living, and was alone responsible for the debt. For the hotel itself I paid $6,000, Col. Andrews $3,000. Col. Andrews' interest being about one-quarter of the hotel, with about ten acres of land adjoining. Before the receipt of your letter I had no idea that any man in North Carolina seriously considered that my owning a piece of property jointly with Col. Andrews, and held jointly by us since 1881, and now rented by a widow, which being in addition to a summer resort was a dinner station for the passenger trains of the Southern railway, would ever in any way be so construed as to make me in any form under obligations to the Southern railway.

Finding, however, by your letter that there were parties who believed or pretended to believe that this was indirectly a violation of the act, I promptly, under the advice of friends, to avoid 'even the

pearance of evil,' deeded my individual interests in the property R. H. Brown for his claim of about $3,000, about the value at the sent depreciation of the property. This was done agreeably to tion 1 of the act to avoid any criticism by even the captious as to conduct as railroad commissioner, feeling no uneasiness that ur fairness as a judge should be so biased as to decide that with showing made you could with any pretention of justice, remove from the office now held by the unanimous support of the legisure of North Carolina; for this unprecedented compliment I have ver before had an opportunity to return thanks.

As to the charges about my son, I will say that he is no minor, charged, but is twenty-seven years old, and is one of the oldest ployees on the division upon which he is stationed. About ven years ago the agent at Morganton resigned. My son was his ief clerk, and in the very line of promotion. V. E. McBee, general perintendent of the Seaboard air line, was at that time superinident of that division; he had previously promised my son, as was told, that he would promote him at the first opportunity. Mr. McBee kept his promise. I have no recollection of it, but it is more than probable that I spoke to Capt. McBee in his half. It would have been a most unnatural father who would ave done otherwise. I believe this covers the entire bill of charges. ut there are other matters of rumor, not in your letter, but calcuted to prejudice your mind. I consider it but simple justice to ate the facts as to each one. It is charged that when the Seaboard stem was endeavoring to give the people cheap rates I interfered. he following is a copy of orders in the case. See Report of the ommissioners to the Governor, page 213: 'It appears from press eports that reduced rates have been again ordered to be put in ffect from certain points outside of this State to certain points ithin, clearly causing a discrimination in violation of the long and hort haul clause of the act creating the commission. Justice to he local business of the State requires us to take prompt action. It therefore ordered by the commission that all roads doing business n the State of North Carolina shall reduce their local tariffs to assenger and freight in the same proportion as has been done by hem on their through business.'

It was my opinion then that our own folks should have at least s good treatment as outsiders. I drew the order and would do so gain under similar circumstances. It is also charged on the streets hat the Seaboard system was unfairly dealt with by me in the matter f their proposed change of line at Gaston. The facts are, that the rder as given was drawn by Capt. McBee, general superintendent f the Seaboard air line, and in his own writing in this office. By his request, the board adopted it as their order, believing it to e a fair solution of the matter. At least the Seaboard should be topped from objecting. The charges as made against me are, in ny opinion, so frivolous that they would have been passed unnoticed had they not been considered as of serious importance by ne who holds the exalted position that you do. It is also charged hat my influence during the session of the legislature was exerted

to prevent a reduction of rates. The last annual report submitted by the commission, with no difference of views by the commissioners, gave the rates of freight and passengers considered by us as just and reasonable. In support of our views a comparison of the rates of all the States in the Union was made and published. We were sworn officers and made this report with regard to the solemnity of our oaths. During the session of the legislature the members of the commission were invited to appear before the joint committee on railroads and give their views as to the justness of the rates now in force. Two of us responded. I, for one, was given a most respectful hearing by the committee. In my argument the report of the commission was sustained by facts and figures. Nothing since has been shown to convince me that I was wrong. The charge that it was argued by me before the committee that to recommend a change of rates would be reflecting on the commission is not warranted by the facts; nothing of the kind was ever alluded to by me—in this I am sure that I will be sustained by the committee.

In justice to myself I will say that I never entered the halls of the legislature during its session, or expressed my views except when solicited to do so by its committee.

These facts have been intended to be given without feeling and in a most respectful manner, and I trust they will be so received by you.

In addition to the facts, I will say that the State of North Carolina has a constitution which you and I have sworn to support. This constitution and the laws as expounded guarantee protection to its humblest citizen. To a lawyer of your acknowledged ability, it may appear presumptious for me to call to your attention sections 4 and 5, article 6, of the Statute constitution, which reads as follows:

'The following classes of persons shall be disqualified for offices: First, all persons who shall deny the being of Almighty God; second, all persons who shall have been convicted of treason, perjury or of any infamous crime,' etc. See also article 4, sec-
18 tion 31. Also article 1, section 19, of Bill of Rights. This I will copy in full, as it is regarded by every freeman as a bulwark of liberty. It reads as follows: 'In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable.'

See also the 14th amendment of the Constitution of the United States, which forbids any State to deprive a citizen of life, liberty or property without due process of law. See also decisions of our supreme court: Hoke *v.* Henderson, 4 Devereux; Cotton *v.* Ellis, 7 Jones; Bunting *v.* Gates, 77 N. C.; Branson *v.* Turner, 70 N. C.; Howerton *v.* Tate, 70 N. C. Legislature cannot confer on an executive judicial powers. See Cooley on Constitutional Limitations. Act 1891, making railroad commission a court of record."

And on the 23rd day of September, 1897, the said governor of North Carolina issued and sent to the defendant the following communication and order:

EXECUTIVE DEPARTMENT,
RALEIGH, N. C., *September* 23, 1897.

To James W. Wilson, Esq., chairman of railroad commission.

SIR: Take notice that, after due investigation and consideration, I am convinced that you have violated the railroad commission law in some of the particulars mentioned in my letter to you August 24th, 1897, and that you have not only violated said act in the specification set out in said act, but that you have otherwise, within the meaning and intent and words of said act become disqualified to act.

Now therefore, in obedience to the duty imposed upon me by said act of the assembly I do hereby suspend you from the office of railroad commissioner and chairman of said commission, such suspension to continue until the question of your removal or restoration shall be determined by a majority of the General Assembly in joint session. The fact of your suspension together with the reasons therefor and the evidence documents and information connected therewith will be reported to the next General Assembly.

You will further take notice that under and by virtue of the powers conferred and duties imposed by law upon the chief executive I have appointed L. C. Caldwell, Esq., of the county of Iredell, to fill the vacancy created by your suspension.

Inasmuch as you are understood to deny the power of the executive to suspend you from office as provided by the statutes, I have requested Mr. Caldwell to make demand upon you for the possession of the office and upon your refusal, to bring action therefor to the end that the title to the office may be judicially determined.

(Signed) D. L. RUSSELL, *Governor.*

To which communication and order the said governor received the following reply:

RALEIGH, N. C., *September* 24, 1897.

To D. L. Russell, governor.

SIR: Your of the 23rd inst. is hereby acknowledged. In reply I will say that I shall disregard your order to suspend, but will continue to do business at the old stand until removed by a tribunal other than a self-constituted "star chamber."

(Signed) JAS. W. WILSON,
Chairman Railroad Commission.

4th. And therefore the relator avers and so charges on information and belief that on the said 23rd day of September, 1897, his excellency, Daniel L. Russell, governor of the State of North Carolina, in pursuance of the power and authority vested in him by section 1, chapter 320, of the Laws of the State of North Carolina, passed by the General Assembly at its session of 1891, ratified the 5th day of March, 1891, and in execution of duty devolved upon him by the said act suspended the said James W. Wilson from the said office

of railroad commissioner and as chairman of said commis-
19 sion. That on the said 23rd day of September, 1897, the said D. L. Russell, governor of North Carolina as aforesaid, appointed the relator, L. C. Caldwell, a railroad commissioner and chairman of the railroad commission, to fill the vacancy caused by the suspension of the said James W. Wilson from said office of commissioner and chairman of said commission from the said 23rd day of September, 1897, to continue until the next General Assembly, shall determine the removal of said James W. Wilson or until your successor is elected and qualified according to law.

5th. That the plaintiff relator duly qualified as railroad commissioner and chairman of said commission by taking the oath prescribed by law before David M. Furches, one of the justices of the supreme court of North Carolina, which oaths were duly deposited in the office of the secretary of state.

6th. That the plaintiff relator, since his appointment and qualification as aforesaid, and before the institution of this action, demanded of the said James W. Wilson that he, the said James W. Wilson, should vacate the said office of railroad commissioner, and surrender the same to the relator, and the said James W. Wilson refused to vacate and surrender the said office to the relator in words and figures, to wit:

SEPTEMBER 28TH, 1897.

Hon. L. C. Caldwell, Statesville, N. C.

DEAR SIR: Your favor of the 25th making your demand for the office of railroad commissioner, together with all the papers, records, rights and privileges thereto belonging, was duly served upon me by the sheriff of Burke county. In reply will say that I most respectfully decline to accede to your request.

Yours very truly, JAMES W. WILSON,
Chairman Railroad Commission.

7th. That the defendant James W. Wilson, notwithstanding the suspension from the office of railroad commissioner and chairman of said commission by the governor of North Carolina as hereinbefore set forth, refuses to vacate the same, and does now unlawfully usurp intrude into, hold and exercise the said office of railroad commissioner and chairman of said commission, and does now prevent and hinder the relator from performing the duties of said office.

8th. That said office of railroad commissioner is an office of trust and profit under the laws of North Carolina.

9th. That leave to bring this action has been given by the attorney general of said State, which leave is attached hereto.

Wherefore the plaintiff demands judgment:

1st. That the defendant has been suspended from his office of railroad commissioner and chairman of said commission according to law.

2nd. That the defendant be adjudged guilty of unlawfully holding and exercising said office, and that he be fined $2,000, in pursuance of the statute.

3rd. That the relator has been duly appointed to fill the vacancy caused by the suspension of the defendant, and is entitled to hold and exercise the said office.

4th. That the defendant be ousted from, and the relator inducted into, said office.

5th. For such other and further relief as may be just and right and for costs of this action.

W. J. MONTGOMERY,
ARMFIELD & TURNER,
A. D. COWLES, *Attorneys.*

NORTH CAROLINA, }
Iredell County. }

L. C. Caldwell, being duly sworn before me, says that he is the relator herein; that the facts set forth in the foregoing complaint are true as of his own knowledge, except as to those matters stated upon information and belief, and as to them he believes it to be true.

L. C. CALDWELL.

Sworn to and subscribed before me, this 9th day of October 1897.
H. V. FURCHES, *C. S. C.*,
By G. B. NICHOLSON, *D. C.*

Filed Oct. 11th, 1897.

H. V. FURCHES, *C. S. C.*,
By G. B. NICHOLSON, *D. C.*

20 NORTH CAROLINA, }
Iredell County. }

Superior Court, November Term, 1897.

STATE OF NORTH CAROLINA on Relation of L. C. CALDWELL *against* JAMES W. WILSON. } Answer.

The defendant, answering the complaint, says:

1. That section 1 thereof is admitted.

2. That section 2 thereof is admitted. Defendant's term of office began April 1, 1893, and ends April 1, 1899.

3. That section 3 of the complaint is admitted.

4. That section 4 of the complaint is denied. But defendant admits that the governor undertook or attempted to suspend or remove the defendant from his said office of railroad commissioner and designated the plaintiff's relator, L. C. Caldwell, to fill the vacancy which he had attempted to create.

5. That the allegations in section 5 of the plaintiff's complaint are not true. He admits that said Caldwell has taken the oath prescribed by law for railroad commissioner.

6. The defendant admits section 6 of the complaint, except that he does not admit the appointment and qualification of said Caldwell any further than he has hereinbefore admitted the same.

7. That he denies section 7 of the complaint, but he admits that he refuses to vacate his office of railroad commissioner and to surrender the same to the relator. The defendant is advised that his suspension was illegal and that he is still entitled to discharge the duties of his office.

8. Sections 8 and 9 of the complaint are admitted.

9. That the General Assembly of North Carolina at its session of 1891 under the authority of the constitution of the State, article 4, sections 2, 12 and 30, passed an act constituting a railroad commission with the powers of a court, which was ratified the fifth of March, 1891, and under said act the defendant was elected a member thereof at the session of 1893 for the term of six years; and on the ninth of March, 1891, the General Assembly of North Carolina passed an act declaring "that the railroad commission elected at this session of the General Assembly and their successors in office be and they are hereby created and constituted a court of record inferior to the supreme court and shall be known as the board of railroad commissioners, and as such shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects embraced in the act creating such railroad commission."

10. That the act ratified March 5, 1891, in section 1 thereof, provides, "that said commissioners shall not jointly or severally or in any way be the holder of any stock or bonds or the agent or attorney or employee of any such company, or have any interest in any way in such company, and shall so continue during the term of his office, and in case any commissioner shall as distributee or legatee or in any other way, have or become entitled to any stock or bonds or interest therein of any such company he shall at once dispose of the same, and in case any commissioner shall fail in this or in case any one of them shall become disqualified to act, then it shall be the duty of the governor to suspend him from office and to report the fact of his suspension together with the reason therefor to the next General Assembly, and the question of his removal from office shall be determined by a majority of the General Assembly in joint session. In any case of suspension the governor shall fill the vacancy, and if the General Assembly shall determine that the commissioner suspended shall be removed, then the appointee of the governor shall hold until his successor is elected and qualified as hereinbefore provided, but if the General Assembly shall determine that the suspended commissioner shall not be removed from his office, then the effect shall be to reinstate him in said office. The person discharging the duties of said office shall be entitled
21 to the salary for the time he is so engaged, but a commissioner who is suspended shall be allowed the salary during his suspension in case he should be reinstated by the next General Assembly: Provided, that no person is eligible as such commissioner who shall have been an attorney of any such company within twelve months next preceding his election to such office;" but the defendant avers, being so advised, that said provisions are unconstitutional and void.

11. That as appears by the complaint the said Daniel L. Russell,

governor, preferred the charges contained in his communication of August 24, 1897, which *is* set out in section 3 of complaint. The defendant appeared before the said governor at the day fixed and filed a written denial of said charges with only an affidavit from V. E. McBee as follows: "In 1893 I was general superintendent of the Western North Carolina railroad, and during the said year appointed the said James W. Wilson, Jr., station agent at Morganton, and in making said appointment did so without consultation or conference with Mr. Wilson's father. J. W. Wilson, Jr., had several years before appointed station agent served as clerk in the said office and proved himself competent to fill the agency." Defendant also filed testimonials from citizens of Morganton showing the business capacity and fitness of said J. W. Wilson, Jr., for the position of agent at that place. And thereupon the defendant demanded of the said governor that the evidence against him be produced, and that he have an opportunity to confront his accusers and cross-examine the witness. This was refused, the governor stating that he had no power to subpœna witnesses.

12. That notwithstanding the denials of the defendant and the affidavit in support thereof, the said governor without evidence and without a trial, undertook to find generally that the defendant had violated the railroad commission law in some of the particulars mentioned in his letter of August 24th, 1897, and that the defendant had not only violated the said act in the specifications set out in said act, but that he had otherwise, within the meaning and intent and words of said act, become disqualified to act. Thereupon the said governor, without a more specific finding, undertook to suspend the defendant and deprive him of his said office.

13. The defendant denies that he is the joint owner with Col. A. B. Andrews, the first vice-president of the Southern railroad, of the Round Knob hotel. He for a valuable consideration sold and conveyed the same between the date of the governor's letter of August 24th, 1897, and August 30th, 1897, by deed to R. M. Brown, as he was entitled to do under the provisions of said act of the General Assembly.

14. That the defendant denies that the said hotel property is worthless as a hotel except when designated and patronized by the Southern railroad as an eating-house for their passenger trains.

15. That the defendant denies that the said hotel property has been unoccupied and unused for any purpose for several years past, and has brought in no revenue to defendant. Up to 1896 it was under lease for five years to Meusett and Frisard at an annual rental of $500. This lease expired some time in the fall or winter of 1896. While three years' rent is still due by them it is perfectly good and collectable, and the same is now in suit.

17. That the defendant denies that it is impossible to use, rent or lease said property unless some understanding, agreement or contract can be made with the Southern railroad to designate and patronize the said hotel as a railroad eating-house.

18. That the defendant denies, except as stated herein, that he

and the other owner or owners of said hotel property secured any agreement, understanding or contract from the Southern Railroad Company to abandon other eating-houses and designate Round Knob as an eating-house, and that by virtue of said agreement with said railroad he was able to lease said hotel property to S. Otho Wilson, or to his mother through the said Wilson, for profit. The facts are fully stated in the defendant's letter of August 30th, 1897, set out in the complaint.

19. That the defendant denies that his son, who is now twenty-seven years of age, was appointed agent at Morganton of the Southern railroad over others entitled to the place by promotion under the practice of the company, and that this was done for his accommodation. He was in the very line of promotion and was appointed in 1893 by V. E. McBee, former superintendent, in pursuance of a previous promise, as defendant is informed and believes, on account of a vacancy in the office in Morganton. His said son was chief clerk to the agent and was appointed on his resignation. Defendant at first thought he may have spoken to Mr. McBee in favor of his son, but on more careful inquiry and reflection is convinced he did not do so, and he therefore denies that he said anything about it — said McBee.

20. That defendant acquired the Round Knob hotel property in 1881. The hotel was built in 1881, or thereabouts, and has been a railroad eating-house at divers times since its erection.

21. The defendant denies that he has acquired any interest in any way in the Southern Railroad Company in violation of law.

22. The defendant denies that he has become disqualified to act as a fair judge or commissioner.

23. That under the laws of North Carolina the defendant has a property in his office, and he demands to have the charges preferred against him tried by a jury in this action.

24. That by the constitution of the State of North Carolina, article 6, sections 1, 2 and 3, it is provided that every male person born in the United States, and every male person who has been naturalized, twenty-one years old or upward, who shall have resided in the State twelve months next preceding the election, and ninety days in the county in which he offers to vote, shall be deemed an elector and eligible to office, except all persons who shall deny the being of Almighty God, and all persons who shall have been convicted of treason, perjury or of any other infamous crime since becoming citizens of the United States, or of corruption or malpractice in office, unless such person shall have been legally restored to the rights of citizenship.

25. That this defendant is in every way qualified to hold office under the requirements aforesaid.

26. That the defendant is advised, and so avers, that any provision of the railroad commission act, chapter 320, of the Acts of the General Assembly of North Carolina, passed at the session of 1891, which prescribe other and different qualifications for the office of railroad commissioner than those laid down by the said provisions of the constitution, are unconstitutional and void.

27. That the board of railroad commissioners is a court of record, and the commissioners are judges under and by virtue of article 4, section 12, of the constitution of the State by which it is provided: "The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government, but the General Assembly shall allot and distribute that portion of this power and jurisdiction, which does not pertain to the supreme court, among the other courts prescribed in this constitution, or which may be established by law in such manner as it may deem best, provide also a proper system of appeals, and regulate by law, when necessary, the method of proceeding, in the exercise of their powers, of all courts below the supreme court, so far as the same may be done without conflict with other provisions of this constitution."

28. That by article 4, section 30, of the State constitution, it is further provided: "In case the General Assembly shall establish other courts inferior to the supreme court the presiding officers and clerks thereof shall be elected in such manner as the Gen-
23 eral Assembly may, from time to time, prescribe, and they shall hold their offices for a term not exceeding eight years."

29. That by article 4, section 31, of the State constitution it is further provided, "Any judge of the supreme court or of the superior court and the presiding officers of such courts inferior to the supreme court as may be established by law may be removed from office for mental or physical inability upon a concurrent resolution of two-thirds of both houses of the General Assembly. The judge or presiding officer against whom the General Assembly may be about to proceed shall receive notice thereof accompanied by a copy of the causes alleged for his removal at least twenty days before the day on which either house of the General Assembly shall act thereon."

30. That the alleged causes of removal set up by the governor are such as apply to no other judges or presiding officers of courts or any other public officers in the State, and the governor has no power to remove or suspend any other judge or presiding officer of courts or any other officer not appointed by him. Wherefore the defendant says the statute and the said action of the governor deprive him of the equal protection of the laws, and are in violation of the fourteenth amendment of the Constitution of the United States, and this defendant expressly claims the protection of said amendment.

31. That, as appears by section 3 of the complaint, the governor cited this defendant before him to answer the charges preferred against him. This defendant fully answered, and generally and specifically denied the charges. Thereupon the defendant demanded to be confronted with his accusers and to hear and cross-examine the witnesses against him. This was refused and no witness or other evidence was produced; and thereafter the governor made his decision, by which he attempted to remove the defendant till the meeting of the General Assembly, early in January, 1899. The defendant submits that this action was without a hearing and without evidence to support it, without any trial and without any right of appeal. Wherefore he says the said action deprives him of his

liberty and property without due process of law and is in direct conflict with the fourteenth amendment to the Constitution of the United States, and the defendant expressly claims the protection of said amendment.

32. That he submits to the court whether by the action of the governor aforesaid the privileges and immunities of defendant as a citizen of the United States have been abridged in violation of the fourteenth amendment to the Constitution of the United States, and if so he expressly claims the protection of said amendment.

33. That the defendant is advised that the General Assembly had no power to confer upon the governor the right of removal or suspension, nor to confer upon itself the power thereafter to pass upon the question of removal or restoration, nor to add to the qualifications for holding office. And the defendant further submits that the matters and things charged against him, and which he fully denies, do not come within the provisions of the act of the General Assembly and do not warrant the action of the governor.

34. The defendant submits, being so advised, that the action of the governor was illegal and void and the defendant is entitled to continue in the exercise of the duties of his office.

Wherefore the defendant prays judgment that he go without day and recover of the plaintiff his costs of action.

A. BURWELL,
JNO. D. SHAW,
JNO. GRAY BYNUM,
SPIER WHITAKER,
T. N. HILL,
R. O. BURTON,
Attorneys for Defendant.

24 James W. Wilson, being duly sworn, says that the foregoing answer is true of his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes it to be true.

JAS. W. WILSON.

Sworn to and subscribed before me this 29th day of October, 1897.

H. E. LITCHFORD, *N. P.*

Filed November 6th, 1897.

H. V. FURCHES, *C. S. C.*

STATE OF NORTH CAROLINA, }
Iredell County. }

Superior Court, November Term, 1897.

STATE on Relation of L. C. CALDWELL }
v. } Amendment to Answer.
JAMES W. WILSON. }

The defendant, by leave of the court, amends section 15 of answer by inserting in lieu of all after the word defendant, in line 3 thereof: In the year 1891 the defendant sold and conveyed said property to

the Carolina Investment Company, a corporation under the laws of this State; and on the 18th day of April, 1893, said company leased it to Stephen Mieusett and Emil Frisard for five years, beginning May 1st, 1893, and ending May 1st, 1898, at the following rental: $250.00 per year for the first two years; $300.00 for the third year; $400.00 for the fourth year, and $500.00 for the fifth year, payments to be made quarterly. About the — day of ——, 1893, the said company, wishing to reconvey said property to the defendant, and not having registered its deed, surrendered it to the defendant, and surrendered the property to him, upon the agreement that he would recognize the lease to Mieusett & Frisard. In the fall or winter of 1896 said Mieusett & Frisard abandoned the property and it was leased to Mrs. Mary Wilson about the — day of January or February, 1897. While Mieusett & Frisard are in arrears for two or three years' rent it is perfectly good and collectable, and is now in suit.

JAS. W. WILSON.

J. W. Wilson, being duly sworn, says the foregoing answer is true of his own knowledge, except as to allegations therein made on information and belief, and as to these matters, he believes it to be true.

JAS. W. WILSON.

Sworn to and subscribed before me this November 8th, 1897.

H. V. FURCHES, *C. S. C.*

Filed November 8th, 1897.

H. V. FURCHES, *C. S. C.*

NORTH CAROLINA, }
Iredell County. }

Superior Court, November Term, 1897.

Be it remembered, that at a superior court began and held on the 9th Monday after the 1st Monday in September, 1897, for the county of Iredell, his honor, A. L. Coble, judge, present and presiding, when and where the following proceeding was had:

* * * * * * *

STATE OF NORTH CAROLINA on the Relation of L. C. CALDWELL }
v. }
JAMES W. WILSON. }

Court takes a recess until 9.30 o'clock Tuesday morning, November 9, 1897.

ALBERT L. COBLE,
Judge Presiding.

STATE OF NORTH CAROLINA on the Relation of L. C. CALDWELL
v.
JAMES W. WILSON.
} Now being Argued by Counsel.

Court takes a recess until 9.30 o'clock Wednesday morning, November 10, 1897.

ALBERT L. COBLE,
Judge Presiding.

25 STATE *ex Rel.* L. C. CALDWELL
v.
JAMES W. WILSON.
} Issues.

The defendant tendered the following issues and demanded a trial by the jury:

1. Is the plaintiff entitled to the office of railroad commissioner?
2. Does the defendant unlawfully intrude into, hold and exercise the office of railroad commissioner and chairman of said commission?
3. Has the defendant acquired any interest in any way in the Southern Railway Company in violation of law?
4. Has the defendant become disqualified to act as a fair judge or commissioner, or has he become in any way disqualified to act?
5. Did the defendant prior to September 1, 1897, sell and convey for a valuable consideration the Round Knob hotel to R. M. Brown?
6. Did the defendant demand of the governor that the evidence against him be produced and that he have an opportunity to confront his accusers and cross-examine the witnesses against him?
7. Was said demand refused?
8. Was any evidence produced?

The court refused to submit the issues to the jury and the defendant excepted.

The relator moved for judgment upon the pleadings; which motion was granted and the defendant excepted.

Motion for new trial. Motion overruled. Defendant excepted.

NORTH CAROLINA,
Iredell County.

Superior Court, November Term, 1897.

STATE on Relation of L. C. CALDWELL
vs.
JAMES W. WILSON.
} Judgment.

This cause coming on to be heard at this term of the court before his honor, A. L. Coble, judge, presiding, upon the motion of plaintiff's counsel for judgment upon the pleadings, and the court being of the opinion that the plaintiff is entitled to recover, it is therefore considered and adjudged by the court:

First. That the defendant Jas. W. Wilson has been duly sus-

pended from his office of railroad commissioner and chairman of said commission, and is unlawfully holding and exercising said office.

Second. That the relator L. C. Caldwell has been duly appointed to fill the vacancy caused by the suspension of said James W. Wilson from said office.

Third. That the defendant James W. Wilson be ousted from said office of railroad commissioner and that the relator L. C. Caldwell be inducted into said office, and that the relator L. C. Caldwell recover of said defendant and the sureties on his bond the costs of this action, to be taxed by the clerk of this court.

ALBERT L. COBLE,
Judge Presiding.

Appeal.

Recorded on Minute Docket No. 10, page 247.

Appeal by defendant to the supreme court. Notice of appeal waived. Appeal bond fixed at $25. Supersedeas bond fixed at $200.

26 NORTH CAROLINA, *Iredell County.*

Superior Court, November Term, 1897.

STATE OF NORTH CAROLINA on Relation of L. C. CALDWELL *against* JAMES W. WILSON.

Statement of Case on Appeal.

Action in the nature of *quo warranto*, tried at November term, 1897, at Iredell superior court, before Coble, J.

At the conclusion of the reading of the pleadings the defendant tendered the following issues and demanded a trial by jury:

1. Is the plaintiff entitled to the office of railroad commissioner?
2. Does the defendant unlawfully intrude into, hold and exercise the office of railroad commissioner and chairman of said commission?
3. Has the defendant acquired any interest in any way in the Southern Railway Company, in violation of law?
4. Has the defendant become disqualified to act as a fair judge or commissioner, or has he become in any way disqualified to act?
5. Did the defendant, prior to September 1st, 1897, sell and convey for a valuable consideration the Round Knob hotel to R. M. Brown?
6. Did the defendant demand of the governor that the evidence against him be produced and that he have an opportunity to confront his accusers and cross-examine the witnesses against him?
7. Was said demand refused?
8. Was any evidence produced?

Thereupon the plaintiff moved for judgment upon the complaint and answer. The defendant here claimed that such motion was irregular, and that the plaintiff should either demur or go to trial before the jury. His honor then, by consent, heard argument both upon the right to a jury trial and upon said motion for judgment.

During the argument the defendant contended, among other things, that the Statute Laws of North Carolina, session of 1881, chapter 320, section 1, and the action of the governor set out in the pleadings, deprived him of the equal protection of the laws, and deprived him of his office without due process of law, as set out in the answer, and therefore the statute and said action of the governor were in violation of the fourteenth amendment to the Constitution of the United States, and he expressly claimed the protection of said amendment. These contentions were disallowed, and the defendant excepted. Exception 1.

Exception 2. The court refused to submit the issues tendered, or any issues, and the defendant excepted.

Exception 3. The court further ruled that the plaintiff was entitled to judgment upon the pleadings. Defendant excepted.

Exception 4. The defendant moved for a new trial for the foregoing alleged errors. Motion overruled, and the defendant excepted.

Exception 5. Thereupon judgment was rendered in favor of the plaintiff as set out in the record. Defendant excepted and appealed to the supreme court. Notice waived in open court. Appeal bond fixed at $25 and filed and approved. Supersedeas bond fixed at $200 and filed and approved.

A. BURWELL,
JOHN D. SHAW,
JOHN GRAY BYNUM,
B. F. LONG,
SPIER WHITAKER,
T. N. HILL,
R. O. BURTON,
Attorneys for Defendant.

27 We hereby accept service of this case on appeal, and hereby approve the same as the case on appeal to the supreme court. Nov. 22, 1897.

AVERY,
ARMFIELD & TURNER,
MONTGOMERY,
COWLES,
Attorneys for Plaintiff.

NORTH CAROLINA, }
Iredell County. }

Superior Court, November Term, 1897.

STATE OF NORTH CAROLINA on Relation of L. C. CALDWELL }
v. }
JAMES W. WILSON. }

Know all men by these presents: that we, James W. Wilson, as principal, and W. E. Walton and James W. Wilson, Jr., as sureties, are held and firmly bound unto the State of North Carolina and L. C. Caldwell in the penal sum of twenty-five dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators.

Sealed with our seals and dated this the 10th day of November, 1897.

The condition of this obligation is such that, whereas judgment has been rendered in this action in favor of the plaintiffs and against the defendant, and defendant has appealed from judgment:

Now therefore, if the said defendant shall pay all costs that may be recovered against him on such appeal, then this obligation to be void, otherwise to remain in full force and effect.

JAS. W. WILSON. [SEAL.]
W. E. WALTON. [SEAL.]
J. W. WILSON, JR. [SEAL.]

NORTH CAROLINA, }
Burke County. }

W. E. Walton and J. W. Wilson, Jr., personally appeared before me this day and first being duly sworn, did depose and say, each for himself, that he is worth the sum of fifty dollars over and above his exemptions by law and his indebtedness.

This 10th day of November, 1897.

P. W. PATTON, *C. S. C.*

[Seal of Burke Superior Court.]

This bond is accepted and approved by me. This November 11, 1897.

H. V. FURCHES, *C. S. C.*

NORTH CAROLINA, }
Iredell County. }

Superior Court.

I, H. V. Furches, clerk of the superior court for Iredell county, hereby certify the foregoing to be a true and perfect copy of the proceedings in the superior court of the foregoing entitled case on appeal to the supreme court as complete, as the same remains on file and of record in my office.

Witness my hand and official seal, this the 22d day of November, 1897.

H. V. FURCHES,
Clerk Superior Court, Iredell County,
By G. B. NICHOLSON, *D. C.*

[Seal of Iredell Superior Court.]

28 Entries of record.—Appeal docketed November 23, 1897; motion of appellee (under rule 13) to advance the cause allowed November 25 in the following opinion:

Motion to Advance the Cause Made by Plaintiff.

A. C. Avery for plaintiff; R. O. Burton for defendant.

Per curiam: This case was tried below since the first day of the present term of this court. If the appeal had not been docketed here till the call of causes from that district at the next term of this court it would have been in time. Rule 5. But the same rule provides that it may be docketed at this term, and the court has often held that if by complying with the statutory provisions as to time in settling cases the appeal gets here at this term before the expiration of the time for docketing cases from that district, it stands regularly for argument at this term. Avery *vs.* Pritchard, 106 N. C., 344 (at bottom of p. 346); Porter *vs.* Railroad, *ibid.*, 478; State *vs.* Deyton, 119 N. C., 881. Here, by observing the statutory regulations, the appeal has gotten here after that district has been passed, and hence is not entitled to be heard as a right, but being a case affecting the title to public office, it comes within rule 13, and the court may set it down for argument. This was done under similar circumstances in Houghtalling *vs.* Taylor at this term, which involved the title to the office of county commissioner, and was set for hearing some weeks after the call of the district to which it belonged. Like the case before us, it was tried below after the beginning of the present term of this court. The appellant's case on appeal was accepted by appellee on November 22, and filed in the clerk's office that day. The Code, sec. 551, then makes it the duty of the clerk to send up the transcript within 20 days (State *vs.* Deyton, 119 N. C., 880), though in civil cases he is not required to do so unless his fees therefor are paid (Baily *vs.* Brown, 105 N. C., 127; State *v.* Nash, 109 N. C., 822), but if the clerk sends it up at
29 once instead of taking the whole 20 days, or does not stand on his right to exact his cost in advance, the appellant cannot complain, and the case is regularly here.

The motion of appellant to put the case off the docket has therefore neither merit nor precedent to sustain it, and in view of the importance of the case to the public the appellee's motion is granted, and it will stand for argument on Saturday, December 4. If the call of causes from the 10th district has not then been closed this case will be called on the Monday following. Motion allowed.

Entries of record.—Case set down for hearing on Saturday, December 4, 1897; argued Dec. 4th. The following opinions and judgment handed down on Dec. 23, about 4.30 p. m.:

30 N. C. Supreme Court, Iredell Co.

STATE *ex Rel.* L. C. CALDWELL
vs.
JAMES W. WILSON, Appellant. } No. 305.

R. O. Burton, J. D. Shaw, T. N. Hill, J. C. L. Harris, Armistead Burwell, and John G. Bynum, for appellant.

A. C. Avery, Armfield, Turner & Cowles, and W. J. Montgomery, for appellee.

DOUGLAS, *J.*:

This is an action, in the nature of *quo warranto*, brought to try the title to the office of railroad commissioner. The defendant was suspended by the governor under the provisions of section 1 of chapter 320 of the Laws of 1891, known as the railroad commission act, and the plaintiff appointed to fill the vacancy so created. The part of the act now under consideration is as follows: "Said commissioners shall not be jointly or severally or in any way be the holder of any stock or bonds or be the agent or attorney or employee of any such company or have any interest in any way in any such company, and shall so continue during the term of his office, and in case any commissioner shall, as distributee or legatee or in any other way, have or become entitled to any stock or bonds or interest therein of any such company he shall at once dispose of the same, and in case any commissioner shall fail in this or in case any one of them shall become disqualified to act, then it shall be the duty of the governor to suspend him from office and to report the fact of his suspension, together with the reason therefor, to the next General Assembly, and the question of his removal from office shall be determined by a majority of the General Assembly in joint session. In any case of suspension the governor shall fill the vacancy, and if the General Assembly shall determine that the commissioner suspended shall be removed, then the appointee of the governor shall hold until his successor is elected and qualified, as hereinbefore provided, but if the General Assembly shall determine that the suspended commissioner shall not be removed from his office,
31 then the effect shall be to reinstate him in said office. The person discharging the duties of said office shall be entitled to the salary for the time he is so engaged, but the commissioner who is suspended shall be allowed the salary during his suspension in case he should be reinstated by the next General Assembly."

The following facts appear from the record: On the 24th day of August, 1897, the governor wrote to the defendant calling his attention to the said act, reciting certain allegations as to the defendant's connection with the Southern Railway Company, and requiring the defendant to show cause, in writing, on or before the first day of

September, 1897, why he should not be suspended from office and a report thereof made to the next General Assembly.

On the 30th day of August, 1897, the defendant filed with the governor his written answer, among other defences denying the power of the governor to suspend him, and alleging the unconstitutionality of that portion of the railroad commission act authorizing such suspension.

On the 23rd day of September, 1897, the governor notified the defendant in writing that after due investigation and consideration he was convinced that the defendant had violated the railroad commission law in some of the particulars mentioned in his letter of August 24th, and that the defendant had not only violated said act in the specifications set out in said act, but that the defendant had otherwise within the meaning and intent and words of said act become disqualified to act, and that therefore he, the governor, did suspend the defendant from the office of railroad commissioner and chairman of said commission, and did appoint thereto the relator Caldwell.

The defendant, on September 24th, replied to the governor as follows: "Sir: Yours of the 23rd inst. is hereby acknowledged. In reply I will say that I shall disregard your order to suspend,
32 but will continue to do business at the old stand until removed by a tribunal other than a self-constituted 'star chamber.'" The relator qualified at once and demanded of the defendant the possession of the said office, together with all its records, which was refused by the defendant.

Thereupon the relator brought this action to recover said office and filed his complaint, fully setting out his cause of action. The defendant answered, alleging that the governor had no power to suspend him; that if such power existed the governor had attempted to exercise it in an arbitrary and unlawful manner, without giving him the fair hearing to which he was entitled by law; that the part of the railroad commission act authorizing such suspension was unconstitutional, inasmuch as it imposed additional and unusual qualifications for said office and interfered with the independent tenure of a judicial officer and deprived him of his property in said office "without due process of law," and that his suspension, in manner and substance, was in violation of the fourteenth amendment to the Constitution of the United States. At the conclusion of the reading of the pleading the defendant tendered the following issues and demanded a trial by jury:

1. Is the plaintiff entitled to the office of railroad commissioner?

2. Does the defendant unlawfully intrude into, hold, and exercise the office of railroad commissioner and chairman of said commission?

3. Has the defendant acquired any interest in any way in the Southern Railway Company in violation of law?

4. Has the defendant become disqualified to act as a fair judge or commissioner, or has he become in any way disqualified to act?

5. Did the defendant prior to September 1, 1897, sell and
33 convey for a valuable consideration the Round Knob hotel to R. M. Brown?

6. Did the defendant demand of the governor that the evidence against him be produced, and that he have an opportunity to confront his accusers and cross-examine the witnesses against him?

7. Was said demand refused?

8. Was any evidence produced?

Thereupon the plaintiff moved for judgment upon the complaint and answer. The defendant here claimed that such motion was irregular, and that the plaintiff should either demur or go to trial before the jury. His honor then, by consent, heard argument, both upon the right to a jury trial and upon said motion for judgment. The defendant's exceptions were as follows: "During the argument the defendant contended, among other things, that the statute, Laws of North Carolina, session of 1881, chapter 320, section 1, and the action of the governor set out in the pleadings, deprived him of the equal protection of the laws, and deprived him of his office without due process of law, as set out in the answer, and therefore the statute and said action of the governor were in violation of the fourteenth amendment to the Constitution of the United States, and he expressly claimed the protection of said amendment. These contentions were disallowed and the defendant excepted. Exception 1.

Exception 2. The court refused to submit the issues tendered or any issues, and the defendant excepted.

Exception 3. The court further ruled that the plaintiff was entitled to judgment upon the pleadings. The defendant excepted.

Exception 4. The defendant moved for a new trial for the foregoing alleged errors. Motion overruled and the defendant excepted."

Thereupon judgment was rendered in favor of the plaintiff relator as follows: "First, that the defendant, James W. Wilson, has been duly suspended from his office of railroad commissioner and chairman of said commission, and is unlawfully holding and exercising said office.

34 Second. That the relator, L. C. Caldwell, has been duly appointed to fill the vacancy caused by the suspension of said James W. Wilson from said office; third, that the defendant, James W. Wilson, be ousted from said office of railroad commissioner, and that the relator, L. C. Caldwell, be inducted into said office, and that the relator, L. C. Caldwell, recover of said defendant and the sureties on his bond the costs of this action, to be taxed by the clerk of this court." The defendant excepted to this judgment and appealed to this court.

The first exception cannot be sustained, as we are utterly unable to see any Federal question whatever involved in this action. The office of railroad commissioner, from which the defendant has been suspended, is an office existing solely under the constitution and laws of this State and created to administer the railroad commission act. It has no recognition in the laws of the United States, does

not interfere with interstate commerce, and is concerned solely in domestic affairs and internal trade. The defendant was not deprived of his office without due process of law. He was cited to appear and answer certain charges, and he did appear and filed an answer. The written notice of the governor, which was admittedly received and acted upon by the defendant, was in effect a citation, and, under the circumstances, had all the force of a summons. The only object of a summons is to bring the defendant into court by giving him legal notice, and if he voluntarily appears, without limiting his appearance, he is held to waive a summons and is as completely in court as if it had been served. The court, or any other tribunal having jurisdiction of the subject-matter, has thereafter complete jurisdiction of the person. Jones *vs.* Penland, 19 N. C., 358; Hyatt *vs.* Tomlin, 24 N. C., 149; Duffy *vs.* Averitt, 27 N. C., 455; Middleton *vs.* Duffy, 73 N. C., 72; Wheeler *vs.* Cobb, 75 N. C., 21; Etheridge *vs.* Woodley, 83 N. C., 11; Penniman *vs.* Daniel, 95
35 N. C., 341; Roberts *vs.* Allman, 106 N. C., 391. In State *vs.* Jones, 88 N. C., 683, 685, this court has said: "The object of *process* is to give notice and an opportunity to make defence to an action. The *scire facias* furnished this notice and the sureties submitted to the jurisdiction and resisted the demand for judgment. A defendant may appear without process and his appearance dispenses with process, since its purpose is to bring him into court and he is in court when he answers and defends the action." That this rule is by no means peculiar to this State will be seen by a reference to the Encyclopedia of Pleading and Practice, vol. 2, p. 639.

What is "due process of law" is generally difficult to define, but we think in the case at bar the defendant has no cause to complain on that score. As the protection of the Constitution of the United States is invoked, we deem it best to omit the numberless authorities in the different State reports and confine ourselves on this point to the decisions of that court, essentially supreme wherever its jurisdiction attaches, and where alone the decisions of this court can ever be called in question.

The case of Murray's Lessee *vs.* The Hoboken Land & Improvement Co., 18 How., 272, was an action of ejectment in which the defendant claimed title to certain lands under a sale made by the United States marshal by virtue of a distress warrant issued by the solicitor of the treasury. It was held that such a warrant of distress was not in conflict with the Constitution of the United States and was "due process of law," and that the action of the executive power in issuing the warrant was conclusive evidence of the facts recited in it and of the authority to make a levy, citing Prigg *vs.* Pennsylvania, 16 Pet., 621; U. S. *vs.* Nourse, 9 Peters, 8; Randolph's Case, 2 Brock., 447; U. S. *v.* Nourse, 4 Cranch C. C., 151; U. S. *vs.* Bullock, cited 6 Pet., 485. The court further says: "Thus
36 it has been repeatedly decided in this class of cases that upon their trial the acts of executive officers, done under the authority of Congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title," citing Foley *vs.* Harrison, 15 Howard, 433; Burgess *vs.* Gray, 16 How., 48. "It is

true also that even in a suit between private persons to try a question of private right the *action of the executive power upon a matter committed to its determination by the Constitution and laws* is conclusive," citing Luther *vs.* Borden, 7 Howard, 1; Doe *vs.* Braden, 15 Howard, 635, and cited in Walker *vs.* Sauvinet, 2 Otto, 93; Davidson *vs.* New Orleans, 6 Otto, 102; Springer *vs.* U. S., 12 Otto, 586, 594; *Ex parte* Wall., 107 U. S., 290; Hilton *vs.* Merritt, 110 U. S., 107; Hurtado *vs.* Cal., 110 U. S., 528, 542.

In the case at bar there can be no question of the right of the governor to appoint the plaintiff if a vacancy legally existed. Foster *vs.* Kansas, 112 U. S., 201, 204. The only question really at issue is the legality of the removal of the defendant, and in this view the State of North Carolina is the real party in interest, as it is her act, through her chief executive, of which the defendant complains. The State has surely as much interest in having her laws properly administered by officers of her choice in every respect qualified for their duties as the General Government can have in the collection of its taxes; and we can see no reason why the action of the governor in suspending the defendant from office in strict accordance with the provisions of a statute which we hold to be constitutional is not fully as much "due process of law" as was the sale of real estate under the warrant of distress, so held in Murray *vs.* Hoboken, *supra.* Under the same authority we feel fully justified in holding that the action of the chief executive of this State, certainly an officer of higher relative rank and greater dignity
37 than a mere solicitor of the treasury, is equally conclusive upon a matter committed to his determination by the constitution and laws of this State. It is at least of equal dignity with a tax-sale certificate, whose recitals are held to be evidence *prima facie* as to all and conclusive as to many of the facts therein alleged. De Treville *vs.* Smalls, 98 U. S., 517, 524.

The defendant has not been denied access to the courts. In fact he did not attempt to appeal from the action of the governor nor seek the aid of the courts, but forcibly retained possession of an office from which he had been rightfully suspended, and forced the *plaintiff* to seek redress in this action. The governor, in his notification of suspension to the defendant, distinctly recognized the right of the defendant to have its legality tested in the courts, and made no attempt to dispossess him. The plaintiff has sought possession only "by the law of the land," as shown by the bringing of this action.

In The Bank of Columbia *vs.* Okely, 4 Wheat., 235, it was held that a party may waive his right to trial by jury by giving a note, payable at a bank, the charter of which authorizes collection by summary process. The defendant may well be deemed to have waived his right to a trial by jury, if any such right he ever had, by accepting office under a statute which expressly provided that he might be suspended by the governor without reference to a jury.

38 In Murray *vs.* Hoboken, *supra*, the court also held, "That the auditing of the accounts of a receiver of public monies

may be, in an enlarged sense, a judicial act must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the militia under the act of 1795 (12 Wheat., 19), or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power that they involved the exercise of judgment upon law and fact," citing U. S. *vs.* Ferreira, 13 How., 40.

It may be urged that a distress warrant for the collection of taxes was held to be "due process of law" because such proceeding was in accordance with the common and statute law of England; but so also was the suspension of a public officer.

We see no error in the trial of the action in the court below, and we affirm its judgment after a full hearing of the defendant's appeal.

This much at least is "due process of law." Morley *vs.* Lake Shore R. Co., 146 U. S., 162. Due process of law does not necessarily imply in all cases the right of trial by jury. If it did, the equitable jurisdiction of the Federal courts would practically be annulled. The
records of this court show, what is common knowledge, that
39 in the recent reorganization of a great railway system, mortgages involving millions of dollars were foreclosed in the circuit court of the United States and the stockholders deprived of every vestige of their property without any suggestion of a jury.

In Walker *vs.* Sauvinet, 92 U. S., 90, the court (Waite, C. J.) says: "*All questions arising under the constitution of the State alone are finally settled by the judgment below.* We can consider only such as grow out of the Constitution of the United States. * * * A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship which the States are forbidden by the fourteenth amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process due according to the law of the land. This process in the States is regulated by the *law of the State.*" In Leeper *vs.* Texas, 139 U. S., 462, 467, it was held "that whether statutes of a legislature of a State have been duly enacted in accordance with the requirements of the constitution of such State is not a Federal question, and the decision of State courts as to what are the laws of the State is binding upon the courts of the United States," citing South Ottowa *vs.* Perkins, 94 U. S., 260, 268; Post *vs.* Supervisors, 105 U. S., 667; Norton *vs.* Shelby County, 118 U. S., 425, 440; Railroad Co. *vs.* Georgia, 98 U. S., 359, 366; Baldevin *vs.* Kansas, 129 U. S., 52, 57. "That law, in its regular course of administration
through courts of justice, is due process, and when secured
40 by the law of the State the constitutional requirement is satisfied, and that due process is so secured by laws operating on

all alike and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributed justice," citing Hurtado *vs.* Cal., 110 U. S., 516, 535; *In re* Kemenler, 136 U. S., 436, 449; Caldwell *vs.* Texas, 137 U. S., 692; see also Giozza *vs.* Tierman, 148 U. S., 657; Duncas *vs.* Mo., 152 U. S., 377; Missouri, &c., R. Co. *vs.* Mackey, 127 U. S., 205; Railroad Co. *vs.* Herrick, 127 U. S., 210; State *v.* Muse, 4 Dev. & Bat., 319; State *v.* Chambers, 93 N. C., 600; State *v.* Moore, 104 N. C., 714.

In Hurtado *vs.* Cal., *supra*, in which the meaning of the phrase "due process of law" is elaborately discussed, it was held that the words "due process of law" in the 14th amendment to the Constitution do not necessarily require an indictment by a grand jury in a prosecution by a State for murder, and that a conviction upon an information for murder in the first degree and a sentence of death thereon was not without due process of law, and was therefore not in violation of the constitutional provision. McNulty *vs.* Cal., 149 U. S., 645; Vincent *vs.* Cal., *ibid.*, 648.

In Munn *vs.* Illinois, 94 U. S., 113, 134, the Chief Justice, delivering the opinion of the court, says: "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process, but the law itself as a rule of conduct may be changed at the will or even at the whim of the legislature unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed and to adapt it to the changes of time and circumstances."

41 In Davidson *vs.* New Orleans, 96 U. S., 97, 105, Justice Miller, for the court, says "that it is difficult, if not impossible, to frame a definition of the constitutional phrase without due process of law at once perspicuous, comprehensive, and satisfactory," but that "it is not possible to hold that a party has, without due process of law, been deprived of his property when, as regards the issues affecting it, he has by the laws of the State a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." And citing Murray *vs.* Hoboken, *supra*, he further says: "An exhaustive judicial inquiry into the meaning of the words 'due process of law,' as found in the fifth amendment, resulted in the unanimous decision of this court that they do not *necessarily* imply a regular proceeding in a court of justice or after the manner of such courts."

The origin, intent, and scope of the thirteenth and fourteenth amendments to the Constitution of the United States are fully and ably discussed in the Slaughter-house cases, 16 Wallace, 36, but as no reasonable extract would do justice to the opinion, it can properly be cited only as a whole.

42 In Missouri *vs.* Lewis, 101 U. S., 22, 31, it is said that "the fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same

remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury and on the other side no such right. Each State prescribes its own modes of judicial proceeding."

In *Ex parte* Wall., 107 U. S., 265, a rule was served upon the petitioner by the United States district judge, without any previous affidavit and upon mere hearsay information, to show cause why he should not be disbarred from practicing as an attorney for taking part in a lynching. The respondent filed a written answer denying the charge and excepting to the jurisdiction of the court. After the examination of one witness and hearing the argument of counsel, the court overruled the exceptions and made an order prohibiting the respondent from practicing at the bar of said court until a further order. On petition for mandamus it was held that the proceeding was regular and was due process of law, and that it was not a
43 *criminal* proceeding and not intended for punishment, but to protect the court from the official ministration of persons unfit to practice as attorneys therein. The proceeding in that case was certainly much more summary and less regular than in the case at bar, while the avowed object was the same. The defendant herein was not suspended by the governor as a punishment for any crime, as he was not charged with crime, but simply with a legal disqualification. The object of his suspension pending a legislative determination was to prevent the danger and scandal of having important official duties performed by one legally disqualified. The railroad commission was constituted by the legislature in obedience to a strong popular demand, and the people have a right to require that the men charged with the grave duty of deciding between them and the great transportation companies, which practically control the commerce of the country, should be absolutely free from the slightest suspicion of interest or bias. Such a requirement is based upon the highest principle of public policy and is no more unreasonable than to say that a clerk or sheriff must give bond for the faithful performance of his duties, that an executor or trustee cannot buy at his own sale, and that a judge shall not sit in his own case.
44 Such provisions are not uncommon. A remarkable instance may be found in the act of August 13, 1888 (25 Statutes at Large U. S., 433), which reads as follows:

"SECTION 7. That no person related to any justice or judge of any court of the United States by affinity or consanguinity within the degree of first cousin shall *hereafter* be appointed by such court or judge to or employed by such court or judge in any office or duty in any court of which such justice or judge may be a member."

It is no crime to be related to a judge of the United States, nor can it be any reflection upon the personal character of such relative, and yet it is made by law an absolute disqualification for office.

The object of the law is clearly not to punish one who has committed no offence, but to relieve the judges from any temptation to appoint incompetent officials and to secure to the people in the selection of their agents the best judgment of the courts.

45 As to the equal protection of the laws guaranteed by the Constitution of the United States, it is well settled that special legislation is not objectionable where it is made to apply equally and without unjust discrimination to all who may be affected by it. The fourteenth amendment does not prohibit legislation limited as to objects or territory, but merely that all persons subjected to it shall be treated alike under like circumstances and conditions. Hayes *vs.* Missouri, 120 U. S., 68; Railroad Co. *vs.* Mackey, 127 U. S., 205; Lowe *vs.* Kansas, 163 U. S., 81, 88.

In Walston *vs.* Nevin, 128 U. S., 578, 582, the court says: "And wherever the law operates alike on all persons and property similarly situated equal protection cannot be said to be denied;" citing Wurts *vs.* Hoogland, 114 U. S., 606; Railroad Co. *vs.* Richmond, 96 U. S., 521, 529. The remedy for abuse is in the State courts, for, in the language of Mr. Justice Field in Mobile *vs.* Kimball, "this court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal, and oppressive State legislation."

In Giazza *vs.* Tiernan, 148 U. S., 657, 651, the court says: "Irrespective of the operation of the Federal Constitution and restrictions asserted to be inherent in the nature of American institutions, the general rule is that there are no limitations upon the legislative power of the legislature of a State except those imposed by its written constitution."

In Duncan *vs.* Missouri, 152 U. S., 377, it was held that the privileges and immunities of citizens of the United States protected by the fourteenth amendment are such privileges and immunities as arise out of the nature and essential character of the Federal Government, and are granted or secured by the Constitution of the United States. Miller on the Constitution, 662; Presser *vs.* Illinois, 116 U. S., 252.

46 In the case of Kennard *vs.* Louisiana, 92 U. S., 480, the plaintiff in error was summarily removed from the office of associate justice of the supreme court of Louisiana, its court of last resort, by a mere rule of court. The plaintiff took out a writ of error asserting that he was deprived of his office without due process of law, in violation of the fourteenth amendment to the Constitution of the United States. The opinion of the court, delivered by Chief Justice Waite, without dissent, and remarkable equally for its clear exposition of the law and admirable condensation, affirmed the judgment for the following reasons: "The question before us is not whether the courts below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the Constitution. Irregularities and mere errors in the proceedings can only be corrected in the State courts. *Our authority does not extend beyond an examination of the power of the courts below to proceed at all.* * * *

It will thus be seen that the act relates specially to the judges of the courts of the State and to the internal regulations of a State in respect to its own officers. * * * He had an opportunity to be

heard before he could be condemned. This was 'process,' and when served it was sufficient to bring the incumbent into court and to place him within its jurisdiction. In this case it is evident from the record that the rule was made, and that it was in *some form* brought to the attention of Kennard, for on the return day he appeared. At first, instead of showing cause why he refused to vacate his office, he objected that he had not been properly cited to appear, but the court adjudged otherwise. He then made known his title to the office. In other words, he showed cause why he refused to vacate. This was, in effect, that he had been commissioned to hold the office till the end of the next session of the senate, and that time had not arrived. Upon this he asked a *trial by jury.*
47 This the court *refused*, and *properly*, because the law under which the proceedings were had provided in terms that there should be no such trial. * * * A mere statement of the facts carries with it a complete answer to all the constitutional objections urged against the validity of the act. The remedy provided was certainly speedy, but it could only be *enforced* by means of orderly proceedings in a court of competent jurisdiction in accordance with rules and forms established for the protection of the rights of the parties. In this particular case, the party complaining not only had the right to be heard, but *he was in fact heard*, both in the court in which the proceedings were originally instituted and, upon his appeal, in the highest court of the State."

I have italicised the words peculiarly operating upon the case at bar. If an inferior court of the State of Louisiana can, by virtue of a statute of that State, upon a mere rule issued upon a *prima facie* case created by said statute, *remove* from office a justice of its highest constitutional court, we cannot see why the chief executive of this State, acting under express authority of a statute and in strict accordance with its terms, cannot *suspend* a member of an inferior administrative court. At least such action affects only the internal policy of North Carolina when dealing with its own officers, and should be judged by its constitution and laws alone.

We have fully considered the first exception, not only from its Federal relation, but also from its important bearing upon the validity of the act under our own constitution, which provides that "No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property *but by the law of the land.*" Therefore, if we were of opinion that the defendant had been deprived of his property in the office "without due process of
48 law"—that is, such process as is due to the peculiar circumstances of his case by the law of the land—it would be our duty to at once reverse the judgment of the court below. In going over the ground covered by this exception we have necessarily been compelled to say much that is applicable to the other exceptions, and which will not be repeated.

The second exception to the refusal of the court to submit the issues tendered, or any issues, is practically directed to the denial of a trial by jury. This, we think, was properly refused, as there were

no disputed facts before the court. It is not denied that the governor notified the defendant to appear and answer; that the defendant did so appear and answer; that the governor subsequently suspended the defendant, giving him written notice of said action, and appointed the relator; that the relator duly qualified, demanded possession of the office, was refused by the defendant, and brought suit.

There was absolutely nothing to go to the jury unless the court went behind the action of the governor, which, we think, could not be reviewed by the court. The suspension by the governor is not a final determination of the defendant's rights, which must ultimately be passed on by the legislature, sitting somewhat in the nature of a court of impeachment. If it should determine that the defendant had been suspended without just cause, he would be at once reinstated and be entitled to his full pay from the time of his suspension. The duty of suspension was imposed upon the governor from the highest motives of public policy, to prevent the danger to the public interests which might arise from leaving such great powers and responsibilities in the hands of men legally disqualified. To leave them in full charge of their office until the next bien-
49 nial session of the legislature or pending litigation which might be continued for years would destroy the very object of the law. As the governor was therefore by the very letter and spirit of the law required to act and act promptly, necessarily upon his own findings of fact, we are compelled to hold that such official action was, under the circumstances, due process of law. Even if it were proper, the governor would have no power to direct an issue like a chancellor.

Section 19 of article I of our Constitution provides that: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people and ought to remain sacred and inviolable," and yet from the remotest times it has been held that this right did not apply to equitable proceedings, and that is the determination of many matters of fact the intervention of a jury was neither necessary nor possible. Take, for instance, applications for receivers, injunctions, and proceedings in contempt. Even in actions at law there are many matters of fact that must be found by the court below, and which are not even reviewable in this court. Every time a judge below takes the case from the jury and directs a verdict, he practically deprives the party of a trial by jury; and yet that he can so direct a verdict against the party on whom rests the *onus*, when there is nothing more than a scintilla of evidence, has been held in a long line of decisions in this court from Wittkowsky *vs.* Wasson, 71 N. C., 451, down to Spruill *vs.* Ins. Co., 120 N. C., 141, and several cases at this term.

In Interstate Commerce Commission *vs.* Brimson, 154 U. S., 447, 488, the court says: "Another suggestion * * * is that the defendants are not accorded a right of trial by jury. * * * The issue presented is not one of fact, but of law exclusively. In such a case the defendant is no more entitled to a jury than is a defendant in a proceeding by mandamus to compel him as an officer to

perform a ministerial duty." Any right of trial by jury
50 which the defendant might have had under other circumstances, if any, would be taken as having been waived by his acceptance of an office under a statute providing for summary suspension. That a jury trial may be waived by either written or oral consent, or even by failure to appear, is expressly provided by section 416 of the Code. It is also held to be waived by a consent reference. Clark's Code, p. 400, and cases cited. In England it is regarded as a prerogative of the Crown by letters patent to suspend a public officer, although the office was granted for life. Throop on Public Officers, section 401; Slingsby's case, 3 Swanst., 178. The only recognition of this rule in America seems to be that involved in the maxim that the power of appointment includes by implication that of removal, the application of which is necessarily limited by constitutional or statutory provision. The maxim cannot apply in this case, because the governor did not originally appoint, and has suspended the defendant under express statutory authority. It comes rather under the generally recognized rule that in the absence of any *constitutional* restriction, expressed or necessarily implied, on the power of the legislature, it may provide by statute for the suspension of a public officer by some other officer or board. Throop, *supra*, sec. 402; Mechen on Public Officers, sec. 463; Butler *vs.* Penn., 10 Howard, 402. With the exception of this State, it is the well-settled doctrine in the United States that an office is not regarded as held under a grant or contract, within the general constitutional provision protecting contracts; but unless the Constitution otherwise expressly provides, the legislature has power to increase or vary the duties or diminish the salary or other compensation appurtenant to the office, or abolish any of its rights of privileges before the end of the term,
or to alter or abridge the term, or to abolish the office
51 itself. Throop, *supra*, sec. 19, citing 92 decisions from the United States Supreme Court and 32 different States; also Black, Const. Law, p. 530, and cases cited. Mechem, *supra*, sec. 463 and 464, citing numerous cases, says that except in North Carolina it is well settled that there is no contract, either express or implied, between a public officer and the government whose agent he is; nor can public office be regarded as the property of the incumbent. In Connor *vs.* N. Y., 2 Sandford, 355, Ruggles, C. J., says: "Public offices are not incorporeal hereditaments, nor have they the character or qualities of grants. They are agencies. With few exceptions, they are voluntarily taken and may at any time be resigned. They are created for the benefit of the public and are not granted for the incumbent. Their terms are fixed with a view to public utility and convenience, and not for the purpose of granting the emoluments during that period to the office-holder.

The celebrated case of Hoke *vs.* Henderson, 4 Dev., 1, recognizes to a great extent the same principle. While deciding in favor of the defendant on the ground that an office is the property of the incumbent by mutual contract, and that the unconstitutional provision was not that of a law *prescribing* a rule of property, or modi-

fying the extent of interest or the tenure *prospectively*, but interfered with *vested* rights, Chief Justice Ruffin (p. 17) says: "That the purpose of creating public offices is the common good is not doubted. Hence most of the rules regulating them have a reference to the discharge of their duties and the promotion of the public convenience; they are *pro commodo populi*. Hence they are *not* the subjects of property in the sense of that full and absolute dominion which is recognized in many other things. *They* are *only the subjects of property as far as they can be so in safety to the general interest involved — the discharge of their duties.*" This court has recently had occasion to reaffirm the doctrine laid down in that oft-quoted
52 decision, which has become too firmly established in the policy of our laws now to be questioned; but the varied and extraordinary claims made thereunder, and the fact that we are the only State in the Union recognizing the doctrine, may well cause us to pause and consider if we have not carried it to its fullest legitimate extent. It may be doubted if the great Chief Justice himself ever contemplated the extent to which it would be carried, and, least of all, that it- most extreme construction would be invoked to bring the tenure of high official positions within the operation of an amendment to the Federal Constitution primarily adopted for the protection of the colored race. See the opinion of Justice Miller in the Slaughter-house cases, 16 Wall., 36.

But our decision in the case at bar does not conflict with that in Hoke *vs.* Henderson. The statute now under consideration is not retrospective, and does not interfere with any vested right. Being a part of the act originally creating the office of railroad commissioner, it "*prescribes*" a rule of property in said office and modifies the extent of interest and tenure therein "*prospectively.*" The defendant, taking under the act, holds subject to the act, and, relying upon his contract, is bound by all its provisions. One of its express provisions was the reserved right of the legislature to remove and the power and duty of the governor to suspend under a given state of facts. This power of suspension, together with the necessary method of its enforcement, was assented to by the defendant in his acceptance of the office. Bunting *vs.* Gales, 77 N. C., 283; McCless *vs.* Meekins, 117 N. C., 34; McDonald *vs.* Morrow, 119 N. C., 665; Ward *vs.* Elizabeth City, 121 N. C.; 27 S. E. Reporter, 993; Koonce *vs.* Russell, 103 N. C., 179; Hutchins *vs.* Town of Durham, 118 N. C., 457; Cooley's Const. Limitations, 285. It was held in Head *vs.* University of Missouri, 19 Wallace, 526, that where one was elected a
53 professor in a State university for six years "subject to law," "this expression meant subject to whatever law the State legislature might see fit to pass. It was a part of the contract that the legislature could, at its discretion and in its pleasure, bring it to an earlier end." In Ewart *vs.* Jones, 116 N. C., 570, which was an action in the nature of a *quo warranto* heard upon a case agreed *without* a jury, this court in seating the relator held that under our present constitution the legislature had the power in establishing the office of judge of the criminal court to prescribe its powers, jurisdiction, and methods of appointment and removal, and to *elect*

the incumbent. Chief Justice Faircloth in delivering the opinion of the court says: "Under our form of government the sovereign power resides with the people and is exercised by their representatives in the General Assembly. The only limitation upon this power is found in the organic law as declared by the delegates of the people in convention assembled from time to time." If the legislature can thus elect a judge of the criminal court and provide for the manner of his removal, why can it not also elect a railroad commissioner, and in the creative act reserve to itself the right to remove and to the governor the power of suspension. Two higher agencies could not be found, one peculiarly representing the will of the people and the other the chief executive of the State, to whom is committed by the constitution itself "the supreme executive power of the State," and who is expressly enjoined "to take care that the laws be faithfully executed;" but it is urged that the legislature has exceeded its constitutional power in reserving the right of removal. We think not, where the office is purely of legislative origin and administrative duties.

54 It is alleged that the statute is unconstitutional because it requires of the railroad commissioners qualifications in addition to those prescribed in the Constitution. We see no merit in this contention, as such provisions were not intended to restrict the rights of the individual, but to secure the faithful and efficient performance of public duties. Hargrove *vs.* Dunn, 73 N. C., 395; Commissioners *vs.* Plaisted, 148 Mass., 375; Rogers *vs.* Buffalo, 123 N. Y., 173, 181; Throop on Public Officers, sec. 73, 74.

Moreover, every presumption is in favor of the constitutionality of an act of the legislature, and all reasonable doubts should be solved in its favor. Cooley on Const. Lim., page 220, and cases therein cited; Black's Const. Law, sec. 30, and cited cases.

While our attention has not been called to any decision from other jurisdictions relating to the removal or suspension of railroad commissioners, we do find in the creative statutes of the United States and of several of the States provisions similar to those now under consideration. The same presumption of constitutionality would attach to them, and thus far they may be considered as precedents. Another constitutional objection to the act has been argued with great force and has received our most careful and serious consideration. That objection is that the act interferes with the independent tenure of the judiciary, so essential to the proper enforcement of the law and the protection of the citizen. This commission was compared to the criminal courts of the State, and the danger of placing the lives and liberties of the people in the keeping of judges whose official tenure might depend upon the uncertain complexion of the legislature or the arbitrary will of the governor was ably and eloquently portrayed.

We realize the responsibilities of this court in settling the line of demarkation between the legislative, executive, and supreme judicial powers, which by constitutional obligation must be kept for-

55 ever separate and distinct. This vital line must be drawn by us alone, and we will endeavor to draw it with a firm

and even hand, free alike from the palsied touch of interest or subserviency and the itching grasp of power. Should the legislative or executive departments of the State cross that line, we will put them back where they belong, but upon us rests the equal obligation of keeping upon our own side. This is a question not of discretion, but of law; a matter not of expediency, but of right.

Our conclusion is that the railroad commission does not stand upon the same footing as the criminal courts, inasmuch as it is an *administrative* and not a *judicial* court. While it was made by a subsequent statute a court of record, it was clearly the object of the act simply to give authenticity to its records and proceedings, as it added nothing to its duties or powers.

It has been held to be a court of record in Express Co. *vs.* Railroad, 111 N. C., 463, 474; but in the opinion of the court, delivered by Chief Justice Shepherd, appears the significant qualification: "Whether a court having no power to enforce its judgment fulfills the definition of a court of record and of general jurisdiction is *unnecessary to be considered.*" The Supreme Court of the United States in Reagan *vs.* Farmers' Loan & Trust Co., 154 U. S., 362, 397, citing the Railroad Commissioner cases, 116 U. S., 307, says: "There can be no doubt of the general power of a State to regulate the fares and freights which may be charged and received by railroads or other carriers, and that this regulation can be carried on by means of a commission. Such a commission is merely an *administrative* board created by the State for carrying into effect the will of the State as expressed by its legislature." Upon the foregoing authorities we are of opinion that the disputed provisions of the act are constitutional, and that the power of suspension rests in the hands of the governor,
56 which, when exercised in an orderly manner, is not reviewable by the courts. Whether the action of the governor was justified by the facts, which he alone could find, is not for us to say. That the defendant has not been deprived of his property without due process of law; that the only property he could have in the office was that given to him by the statute, which must be construed in all its parts. His commission, which is his title deed, appears to us with the fateful words of the creative act written across its face by the hand of the law. Whatever right to a trial by jury he might otherwise have had was waived by his acceptance of the office under the conditions of the statute, at least so far as the action of the governor was concerned. In the court below, as all the material facts that could there be inquired into were practically admitted, there was nothing left but the bare questions of law, and upon those questions we see no error in the ruling of the court. The judgment must therefore be affirmed; but, in view of the public interests involved, we deem it proper not to remand the case, but to enter final judgment in this court. This action is taken on motion of counsel, made without objection, in open court, upon the hearing of the case and under authority of section 957 of the Code, as recognized in Bernhardt *vs.* Brown, 118 N. C., 700, 710. Judgment will therefore be entered, that the relator is entitled to the office of railroad commissioner and chairman of said commission;

that the defendant is not entitled thereto and shall be *be* ousted therefrom, and that the relator be placed into possession of said office, together with all its records and other appurtenances thereunto belonging.

Affirmed.

57 FAIRCLOTH, *C. J.*, dissenting:

As I do not agree with the majority of the court in this case, I feel it my duty to state why I do not. I concede the right of the legislature to abolish any office of its own creation, in which event the officer goes with the office, not upon any notion of implied notice in the acceptance, but because the legislature has the power to abolish. By the act of 1891, chapter 320, the legislature created the office of a railroad commission, with the powers and duties therein enumerated, and elected the members of the commission, the term of office being six years. That said commission is a court of record, with the powers and jurisdiction of a court of general jurisdiction, to the extent of all subjects embraced in said act, is settled. Express Co. *vs.* Railroad, 111 N. C., 463; Railroad *vs.* Tel. Co., 113 N. C., 213; Leavell *vs.* Tel. Co., 116 N. C., 211. That an office is property has been uniformly held since 1833. Hoke *vs.* Henderson, 4 Dev., 1. Section 1 of said act provides: "Said commissioners shall not jointly, or severally, or in any way be the holder of any stock or bonds, or be the agent or attorney or employee of any such company, or have any interest in any way in such company, and shall so continue during the term of his office, and in case any commissioner shall, as distributee or legatee or in any other way, have or become entitled to any stock or bonds or interest therein of any such company, he shall at once dispose of the same; and in case any commissioner shall fail in this, or in case any one of them shall become disqualified to act, then it shall be the duty of the governor to suspend him from office and to report the fact of his suspension, together with the reason therefor, to the next General Assembly, and the question of his removal from office shall be determined by
58 a majority of the General Assembly in joint session. In any case of suspension the governor shall fill the vacancy, and if the General Assembly shall determine that the commissioner suspended shall be removed, then the appointee of the governor shall hold until his successor is elected and qualified as hereinbefore provided," &c. Thus we see that the governor *suspends* whenever he deems proper, and the legislature *removes* at its will and pleasure, as an *ex parte* proceeding, the officer (commissioner) having no opportunity to be heard. This proceeding is at least a novelty, and so far as I remember is without precedent, certainly so in North Carolina. Such proceedings, no doubt, are found under some forms of government, but they are at variance with all fundamental rules of government in the United States of America. Those rules protect life, liberty, and property in the due administration of law.

My conception is that the act of the governor in suspending the defendant was not an executive function, but simply the act of an agent of the legislature with such power as they attempted to con-

fer on their agent, and that the term "governor" was simply used to identify the agent. I can see no reason why the secretary of state could not as well have been the agent, with directions, for the causes mentioned in the act, to suspend the governor from his office until the legislature should have an opportunity to remove or restore him, as they might choose to do, without any hearing for him. If this can be done for the causes specified in section 1 of the act, then other like causes might be added. Let us then suppose that the legislature, in addition, had said: If the governor shall own any stock in any railroad in this State or shall receive any benefit, convenience, or accom-odation from any railroad, then the sec-
59 retary of state shall suspend him from office and report his act *ot* the next legislature, and that they will remove or restore him, as seems good to them. It seems to me that such action would be in derogation of his rights under article III, sec. 12, and article IV, sec. 3 and 4, of the constitution, providing for his conviction, removal, and disqualification for office. It is true that he is a constitutional officer, and so is the defendant, under the authority of article IV, section 2.

So the real question is the *power* of the legislature to suspend and remove a judicial officer from his office, and thus forfeit his property without giving him a trial.

Under our form of government the source of all power is the people. At the outset they declared their will in the constitution and adopted by common consent general rules for governing themselves known as the law of the land, and each department, with their many subdivisions, are subordinate to those fundamental principles. The constitution is a brief and condensed expression of law, and must be taken as expressed, with all of its reasonable implications. Among its utterances we find: "The legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other." Art. I, sec. 8.

"The executive department shall consist of a governor, in whom shall be vested the supreme executive power of the State," &c. Art. III, sec. 1.

"The judicial power of the State shall be vested in a court for the trial of impeachments, a supreme court, superior courts, courts of justices of the peace and such other courts inferior to the supreme court, as may be established by law." Art. IV, sec. 2.

"The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightly
60 pertains to it as a co-ordinate department of the government." Art. IV, sec. 12. And this article provides, further, that the legislature may distribute the power and jurisdiction, provide for appeals, and regulate the method of proceeding as it may deem best, "so far as the same may be done without conflict with other provisions of this constitution." "No person ought to be taken, imprisoned or disseised of his freehold, liberties or privileges, or outlawed or exiled or in any manner deprived of his life, liberty or *property*, but by the law of the land." Art. I, sec. 17.

"In all controversies at law respecting property, the ancient mode

of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." Art. I, sec. 19.

The terms "due process of law" and "the law of the land," when the rights of property are under consideration, are not easily distinguished. I have seen no better definition of the latter than that given by Mr. Webster in Dartmouth College *vs.* Woodward, 4 Wheat., 519 (Works of Webster, vol. V, p. 487). "By the law of the land is most clearly intended the general law—a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms, would be
the law of the land. Such a strange construction would
61 render constitutional provisions of the highest importance
completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or administer the justice of the country."

A glance at the above recitals would seem to answer without further argument the question, "Has the legislature the power, directly or indirectly, to suspend or remove a judicial officer and declare his right and property in his office forfeited?"

It has been universally held in this country wherever *freemen* live that no forfeiture of an office nor vacancy therein can be judicially declared until the accused has had a trial and sufficient cause is established. Hoke *vs.* Henderson, 4 Dev., 1; People *vs.* Heaton, 77 N. C., 18; Vann *vs.* Pipkin, 77 N. C., 408; State *vs.* Norman, 82 N. C., 687.

"The term 'law of the land' does not mean merely an act of the General Assembly. If it did, every restriction upon the legislative authority would be at once abrogated." Hoke *vs.* Henderson, *supra.*

Suppose the General Assembly at its next meeting shall examine the governor's report and, finding no sufficient cause, shall *adjudge* that defendant was not duly suspended, and that he has not forfeited his office, and the plaintiff shall refuse to surrender his possession of the office, what then? With these conflicting decisions, to what tribunal can the parties appeal for a finality? Any legislative act that *can* lead to such a result must be a nullity. Any legislative sentence declaring a forfeiture of property is judicial in its nature, and when rendered without a hearing and trial is in the nature of things void. The constitutionality of an act is determined by its effect rather than the intent of the legislature. Bank Tax case, 2 Wallace,

200; Provident Ins. Co. *vs.* Mass., 6 Wallace, 611. It may be
62 competent, as I have said, to abolish an office when the property therein is necessarily lost, but it is quite a different proposition to continue the office, discharge the officer at pleasure, and give his office to another. I am told that every office is accepted with notice that the officer may be displaced or removed. That is not an express condition, but at most is only an implied condition, and it is equally implied that such removal, when personal and property rights have vested, can be made only after *cause* established by a court having jurisdiction and by proceedings recognized by the general and fundamental rules of law and by judicial authority. Conditions precedent may bar an entry, but a condition subsequent, even if it be illegal or immoral, cannot divest an estate. A subsequent condition is not self-executing, and when invoked for the purpose of convicting and declaring a forfeiture it becomes effective only under the rule and the manner above stated.

There is no allegation of incompetency, bad faith, or misadministration against the defendant in the discharge of his duties in office. The matters preferred by the governor in his suspending order, rather vaguely stated and based upon private information and newspaper reports, are inserted in the complaint and substantially constitute the complaint. The defendant specifically denies each material allegation. When brought before the superior court under the form of a trial the defendant demanded to hear the proof of the matters alleged, to confront his accusers, to cross-examine, to introduce his own evidence, and to have the issues determined by a jury of his peers. These requests were all refused by the court and judgment was pronounced declaring that defendant had been duly suspended from his office and ordering his ouster therefrom. This court is now appealed to to affirm said judgment and approve the procedure below in this case.

63 Without exhausting the argument, my excuse for tediousness is the importance of this question. I think the plaintiff's contention is injurious, subversive, and contrary to the organic law of our system of government, and that it is unreasonable and unjust, and that the decisions of any court in any State disregarding those principles must soon fall under the condemnation of the legal mind in this country.

64 *Judgment.*

This cause coming on to be heard in the supreme court and having been decided in favor or the plaintiff, it is adjudged and decreed:

1. That the defendant has been lawfully suspended from the office of railroad commissioner.

2. That the relator has been duly appointed to fill the vacancy caused by the suspension of the defendant.

3. That the defendant be ousted from and the relator be inducted into said office of railroad commissioner.

Therefore let a writ issue out of this court, directed to the sheriff or other lawful officer of Wake county, commanding him to oust the defendant and put the relator in possession of the rooms occupied as offices by the railroad commissioners, in the Agricultural building, on Edenton street, in Raleigh, and known as the railroad commission offices, together with all property, paper, and effects appertaining or belonging to said offices.

That the plaintiff relator recover the costs of this action, to be taxed by the clerk of this court.

WALTER CLARK,
Justice Supreme Court.

65 *Entry of Record.*

At 5.30 p. m. on December 23 the plaintiff, through his counsel, William H. Day, obtained a writ of execution, directed to the sheriff of Wake county, in the following words:

(Title of Cause.)

Supreme Court of N. C., Fall Term, 1897.

The State of North Carolina to the sheriff of Wake county, Greeting:

Whereas in the above-entitled cause it was adjudged at this term that the defendant wrongfully withholds possession of the office of railroad commissioner from the plaintiff relator, and that plaintiff relator is entitled to the possession of the same, these are therefore to command you forthwith to put the relator in possession of the rooms occupied as offices by the railroad commissioners, in the Agricultural building, on Edenton street, and known as the railroad commission offices, together with all property, papers, and effects appertaining or belonging to said offices, and to oust the defendant from said office and to induct the plaintiff's relator into the same, and you shall make due return thereof on the first day of the next term of this court.

Witness this 23rd day of December, 1897.

By the court:

[L. S.] THOS. S. KENAN, *S. C. C.*

66 North Carolina Supreme Court, December 24, 1897.

The plaintiff, through his counsel, William H. Day, mowed (orally) in open court to set aside the supersedeas proceedings or adjudge them irregular, and the counsel for the defendant submitted the following motion:

To the honorable the supreme court of North Carolina:

The defendant respectfully shows to the court that judgment herein was rendered in the afternoon of Thursday, December 23, 1897; that execution thereon was issued by the clerk of this court to the sheriff of Wake county about 5.30 o'clock p. m. on the same

day, but has not been executed; that the defendant's counsel sued out a writ of error to the Supreme Court of the United States, which was duly issued by the clerk of the United States circuit court for the eastern district of North Carolina and was allowed by the chief justice of this court on the same day; that the defendant also gave a good and sufficient bond in a penal sum fixed by his honor the chief justice, conditioned as a supersedeas bond, who duly approved said bond and signed the citation; that at 7.10 o'clock p. m. the defendant's counsel filed said writ of error and bond in the clerk's office of this court, and at the same time lodged therein a copy of said writ of error for the State of North Carolina and a copy for L. C. Caldwell. The defendant submits to the court that the judgment of the court is superseded, and he respectfully asks that the said execution be recalled.

R. O. BURTON,
SPIER WHITAKER,
For Defendant.

This 24th December, 1897.

On the same day, December 24, the following opinion was handed down:

67 CLARK, *J.:*

This is a motion by defendant to recall the execution which issued to put the relator in possession of the furniture, rooms, and other tangible property belonging to the railroad commission. The relator moved to set aside the supersedeas proceedings or adjudge them irregular. We are of opinion that we have no power to set aside the writ of error or pass upon the regularity thereof. We are also of opinion that the judgment of this court, *ex proprio vigore*, placed the relator in possession of the office at the time the judgment was filed. He having already qualified, no process was necessary for that purpose. He is in full possession of the same and entitled to exercise its duties and draw the salary thereto attached from the date of his appointment. The judgment took effect immediately upon being filed and is not superseded by the subsequent writ of error, regular or irregular. Foster *vs.* Kansas, 112 U. S., 201. The relator being in office by virtue of the judgment of this court, any attempt by the defendant to exercise its functions or to interfere with the full and free exercise thereof by the relator and any attempt by any one else to interfere, by alleged legal process or otherwise, unless and until the Supreme Court of the United States shall reverse the judgment of this court, will be a contempt of this court. We decline to make any order recalling the execution.

Both motions refused.

68 North Carolina Supreme Court.

I, Thomas S. Kenan, clerk of the supreme court of the State of North Carolina, do hereby certify the foregoing to be a full, true, and correct transcript of the action entitled State of North Carolina on

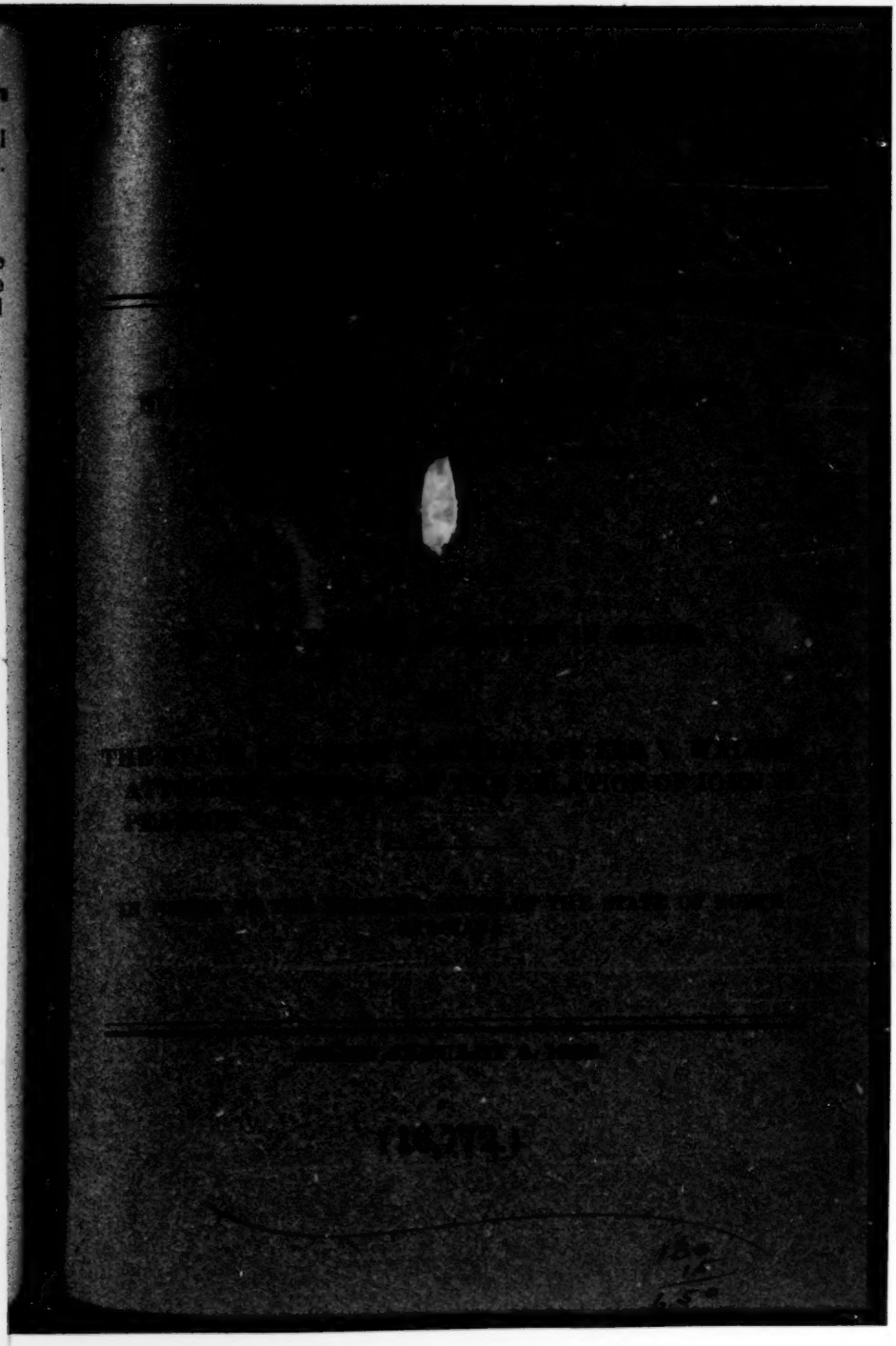
the relation of L. C. Caldwell against James W. Wilson, as appears of record in this court.

In witness whereof I have hereto set my hand and affixed the seal of said court, at office, in Raleigh, this 29th day of December, 1897.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN, *S. C. C.*

Endorsed on cover: Case No. 16,771. North Carolina supreme court. Term No., 558. James W. Wilson, plaintiff in error, *vs.* The State of North Carolina on the relation of L. C. Caldwell. Filed January 4th, 1898.



(16,772.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 559.

S. OTHO WILSON, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH CAROLINA, BY ZEB. V. WALSER, ATTORNEY GENERAL, ON THE RELATION OF JOHN H. PEARSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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PEARSON
v.
WILSON. } Case No. 160 "A."

From the supreme court of the State of North Carolina.

NORTH CAROLINA:

In Supreme Court, September Term, 1897.

TE OF NORTH CAROLINA, by ZEB. V. Valser, Attorney General, on Relation f John H. Pearson,
against
S. OTHO WILSON. } Petition for Writ of Error.

The above-named defendant, considering himself aggri-ved by the gment and decision of the supreme court of North Carolina dered December 23, 1897, excepts to said judgment and decision l prays for a writ of error to the end that said judgment and de-on may be inquired into by the Supreme Court of the United tes and all errors found therein be reversed. Wherefore he prays t said writ of error be granted and a transcript of the record l proceedings and papers upon which said judgment and de-on was rendered, duly authenticated, may be sent to the Supreme irt of the United States.

Raleigh, N. C., December 23d, 1897.

R. O. BURTON,
Attorney for S. Otho Wilson.

UNITED STATES OF AMERICA, *ss:*

e President of the United States of America to the honorable the udges of the supreme court of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of e judgment of a plea which is in the said supreme court, before you some of you, being the highest court of law or equity of the said ate in which a decision could be had in the suit wherein The ate of North Carolina, by the attorney general, on the relation of hn H. Pearson, is plaintiff and S. Otho Wilson is defendant, herein was drawn in question the validity of a statute of or of an thority exercised under said State, on the ground of their being pugnant to the Constitution, treaties, or laws of the United States, d the decision was in favor of such their validity, a manifest error ath happened, to the great damage of the said S. Otho Wilson, as by s complaint appears, we, being willing that error, if any hath been, ould be duly corrected and full and speedy justice done to the arties aforesaid in this behalf, do command you, if judgment e therein given, that then, under your seal, distinctly and openly, ou send the records and proceedings aforesaid, with all things con-erning the same, to the Supreme Court of the United States,

together with this writ, so that you have the same at Washington on the 20th day of January, 1898, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

4 Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 23d day of December, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-second.

[Seal U. S. Circuit Court, Eastern District of N. C.]

N. J. RIDDICK,
Clerk of the Circuit Court of the United States for the Eastern District of North Carolina.

Allowed by—
W. T. FAIRCLOTH,
Chief Justice of the Supreme Court of North Carolina.

5 North Carolina Supreme Court, September Term, 1897.

STATE OF NORTH CAROLINA, by ZEB. V. WALSER, Attorney General, on Relation of JOHN H. PEARSON,
against
S. OTHO WILSON.

Assignment of Errors.

And now, on this 23d day of December, 1897, comes the defendant, S. Otho Wilson, plaintiff in error, by his attorney, Robert O. Burton, and says that in the record and proceedings in the above-entitled matter there is manifest error, in this, to wit:

First. That the supreme court erred in holding that the defendant was not removed or suspended from his office of railroad commissioner without due process of law and contrary to the fourteenth amendment to the Constitution of the United States.

Second. That the supreme court erred in holding that in the removal or suspension of the defendant he was not deprived of the equal protection of the laws, contrary to the fourteenth amendment to the Constitution of the United States.

Third. That it appears by the record in this case that the governor made certain charges against the defendant in his letter of August 24th, 1897, and cited him to appear before him on the first day of September, 1897, and show cause in writing and to make answer and proofs in writing and to be there in person or by counsel, at his election; that the defendant appeared and filed a written denial of all the charges and demanded to be confronted with his accusers and to hear and cross-examine the witnesses against him; that said demand was refused; that the facts were not in the personal knowledge of the governor, and that the governor, without evi-

dence and without a trial, undertook to find generally
6 that the defendant had violated the railroad commission law in some of the particulars mentioned in his letter of August 24th, 1897, set out in the complaint, and that the defendant had not only violated the said act in the specifications set out in the said act, but that he had otherwise within the intent and meaning and words of said act become disqualified to act, and thereupon the governor undertook to suspend or remove the defendant and deprive him of his office and appointed the relator, John H. Pearson, to fill the same; that defendant declined to surrender his office, and thereupon this action in the nature of *quo warranto* was brought to oust him therefrom; that in the superior court the defendant filed his answer, controverting all the charges made against him, and tendered issues covering all phases of the controversy; that the trial court refused to submit the issues or any issues to the jury, but ruled that the statute and the action of the governor did not deprive the defendant of his liberties and property without due process of law, and that the plaintiff was entitled to judgment for the possession of the office on the pleadings; that the defendant duly excepted and appealed to the supreme court, and the ruling and decision of the trial court was sustained and the judgment affirmed.

The defendant says said ruling and decision is erroneous and in violation of the fourteenth amendment to the Constitution of the United States.

Fourth. That the defendant is a judge of a court of record under the laws of North Carolina, and no judge or other officer is liable to removal or suspension by the governor. Moreover, the constitution of North Carolina, art. 4, sec. 30, confers the power of removal of judges on the General Assembly for mental and physical
7 inability, which this defendant claims is a prohibition against removal by the governor or legislature for other causes. The supreme court holds that by the action of the governor the defendant is not deprived of the equal protection of the laws, and the defendant says that the said ruling and decision are erroneous and in violation of the fourteenth amendment to the Constitution of the United States.

Wherefore the said S. Otho Wilson prays that the judgment of the supreme court of North Carolina be reversed.

Raleigh, N. C., December 23d, 1897.

R. O. BURTON,
Defendant's Attorney.

8 UNITED STATES OF AMERICA, *ss:*

To the State of North Carolina and Zeb. V. Walser, attorney general, and John H. Pearson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the 20th day of January, 1898, pursuant to a writ of error filed in the clerk's office of the supreme court of North Carolina, wherein S. Otho Wilson is plaintiff in error and The State of North Carolina, by Zeb.

V. Walser, attorney general, on the relation of John H. Pearson, is defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness William T. Faircloth, chief justice of the supreme court of North Carolina, this 23d day of December, 1897.

W. T. FAIRCLOTH,
Chief Justice of the Supreme Court of North Carolina.

The foregoing papers endorsed: Filed on Thursday, the 23d day of December, 1897, at 7.10 p. m., in the supreme court of North Carolina clerk's office, together with copies of the writ of error for the State of North Carolina and for Z. V. Walser, attorney general, and for John H. Pearson, plaintiff, relator.

9 In the Supreme Court of the United States.

S. OTHO WILSON, Plaintiff in Error,
against
THE STATE OF NORTH CAROLINA, by Z. V. WALSER, Attorney General, on Relation of JOHN H. PEARSON, Defendant in Error.

I, O. J. Carroll, United States marshal for the eastern district of North Carolina, do hereby certify that on the 24th day of December, 1897, in my district aforesaid, I served the citation herein on John H. Pearson by delivering to him a true copy thereof, and on the 29th day of December, 1897, in my district aforesaid, I served the said citation on the State of North Carolina by delivering a true copy thereof to Daniel L. Russell, governor of said State.

Witness O. J. Carroll, United States marshal for said district, this December 29th, 1897, in Raleigh, N. C.

O. J. CARROLL,
U. S. Marshal,
By J. E. CARROLL, *D. M.*

Fees, $4.00, p'd by plaintiff in error.

10 [Endorsed:] S. O. Wilson *v.* The State of N. C. Marshal's certificate.

11 UNITED STATES OF AMERICA:

In Supreme Court.

S. OTHO WILSON, Plaintiff in Error,
against
THE STATE OF NORTH CAROLINA, by Z. V. WALSER, Attorney General, on the Relation of John H. Pearson, Defendant in Error.

I do hereby admit service of the citation in this cause on this 27th day of December, 1897.

ZEB. V. WALSER,
Attorney General of North Carolina.

12 [Endorsed:] S. Otho Wilson, plaintiff in error, *v.* State *ex rel.* Jno. H. Pearson. Admission of service.

13 *Bond on Writ of Error.*

Know all men by these presents that we, S. Otho Wilson, as principal, and J. S. Carr and H. C. Brown, as sureties, are held and firmly bound unto the State of North Carolina and John H. Pearson in the sum of four thousand dollars, to be paid to the said State of North Carolina and John H. Pearson or either of them, their attorneys or assigns; for the payment of which, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 14th day of December, 1897.

Whereas at the September term, 1897, of the supreme court of North Carolina, in an action therein depending between The State of North Carolina, by Zeb. V. Walser, attorney general, on relation of John H. Pearson, plaintiff, and S. Otho Wilson, defendant, a judgment has been rendered in favor of the plaintiff, ousting the defendant from his office of railroad commissioner and taxing him with costs; and whereas the defendant has obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid action, and a citation directed to the said plaintiffs has been issued, citing and admonishing them to be and appear at the United States Supreme Court, in Washington, on a day named in the citation mentioned: Now, the condition of the above obligation is such that if the said S. Otho Wilson shall prosecute his said writ of error to effect and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

S. OTHO WILSON. [SEAL.]
J. S. CARR. [SEAL.]
H. C. BROWN. [SEAL.]

14 J. S. Carr, being duly sworn, says that he is worth the sum of ten thousand dollars over and above his exemptions by law and his indebtedness.

J. S. CARR.

Sworn to and subscribed before me this December 14, 1897.

W. T. SMITH, [L. S.]
Notary Public.

H. C. Brown, being duly sworn, says that he is worth the sum of two thousand dollars over and above his exemptions by law and his indebtedness.

H. C. BROWN.

Sworn to and subscribed to before me this Dec. 15, 1897.

W. T. SMITH, [L. S.]
Notary Public.

Approved December 23, 1897.

W. T. FAIRCLOTH,
Chief Justice of the Supreme Court of North Carolina.

Endorsed: Filed December 23, 1897, at 7.10 p. m., in the supreme court of N. C. clerk's office.

15 *Transcript to Supreme Court of North Carolina.*

NORTH CAROLINA,
Wake County.

Be it remembered that on the 4th day of October, A. D. 1897, the State of North Carolina, by Zeb. V. Walser, attorney general, on the relation of John H. Pearson, railroad commissioner, sued and prosecuted out of the superior court of the county aforesaid a summons in the words hereinafter following:

NORTH CAROLINA, EXECUTIVE DEPARTMENT,
OFFICE OF THE ATTORNEY GENERAL,
RALEIGH, N. C., *Sept. 30th*, 1897.

STATE on Relation of JNO. H. PEARSON
v.
S. OTHO WILSON.

Application having been made to me by John H. Pearson for leave to bring an action in the name of the State upon the relation of the said John H. Pearson *v.* S. Otho Wilson, in the superior court of Wake county, to try the title to the office of railroad commissioner of North Carolina, and satisfactory security having been tendered me under section 608 of the Code to indemnify the State against all costs and expenses which may accrue in consequence of the bringing of such action—

Leave is hereby granted to the said applicant to bring the said action in the name of the State upon the relation of the said applicant against the said S. Otho Wilson.

ZEB. V. WALSER,
Attorney General.

WAKE COUNTY:

In the Superior Court.

THE STATE OF NORTH CAROLINA, by ZEB. V. Walser, Attorney General, on the Relation of John H. Pearson, Railroad Commissioner,
v.
S. OTHO WILSON.
Summons for Relief.

The State of North Carolina to the sheriff of Wake county, Greeting:

You are hereby commanded to summon S. Otho Wilson, the defendant above named, if he be found within your county, to be and

to appear before the judge of our superior court, at a court to be held for the county of Wake, at the court-house in Raleigh, N. C., on the seventh Monday after the first Monday of September, 1897, it being the 25th day of October, 1897, and answer the complaint, a copy of which is served with the summons, and let the said defendant take notice that if he fail to answer the said complaint within the time required by law the plaintiff will apply to the court for the relief demanded in the complaint.

Hereof fail not, and of this summons make due return.

Given under my hand and seal of said court, this 4th day of October, 1897.

D. H. YOUNG,
Clerk Superior Court, Wake County.

We acknowledge ourselves bound unto S. Otho Wilson, the defendant in this action, in the sum of two hundred dollars, to be void, however, if the plaintiff's relator, John H. Pearson, shall pay to the defendant all such costs as the defendant may recover of the plaintiff in this action.

Witness our hands and seals, this 27th day of September, 1897.

JNO. H. PEARSON. [SEAL.]
W. C. EWIN. [SEAL.]
C. MANLY McDOWELL. [SEAL.]

Sworn to and subscribed before me this 27th day of September, 1897.

P. W. PATTON, *C. S. C.*

16 STATE *ex Rel.* JOHN H. PEARSON
v.
S. OTHO WILSON.

Summons for Relief.

Returnable to —— term, 189–, of the superior court of Wake county.

Received October 4th, 1897.

Served October 4th, 1897, by reading this summons and delivering a copy of the same and of the complaint hereto attached to the defendant.

Fee sheriff $1.20, paid to use C. S. C.

HAM T. JONES,
Sheriff of Wake County.
W. T. OAKS, *D. S.*

MACRAE & DAY,
Plaintiff's Attorneys.

NORTH CAROLINA,
Wake County.

Superior Court, October Term, 1897.

THE STATE OF NORTH CAROLINA, by ZEBULON V. Walser, Attorney General, on the Relation of John H. Pearson, Railroad Commissioner,
v.
S. OTHO WILSON. } Complaint.

The plaintiff complains and alleges:

1. That the plaintiff's relator is a citizen and tax-payer of the county of Burke, in the State of North Carolina.

2. That the defendant, on and before the 23d day of September, 1897, was a railroad commissioner, elected by the General Assembly of North Carolina, at its session of 1896, for the term of six years from the ——, 1896.

3. That as the relator is informed and believes, on the 24th day of August, 1897, His Excellency, Daniel L. Russell, governor of North Carolina, addressed and sent to the defendant a communication in the following words:

Notice to Hon. Otho S. Wilson.

STATE OF NORTH CAROLINA,
EXECUTIVE DEPARTMENT,
RALEIGH, *August* 24, 1897.

To S. Otho Wilson, Esq., member of the railroad commission of North Carolina.

SIR: By section first of the railroad commission act, ratified the fifth day of March, 1891, it is made the duty of the governor to suspend from the office any railroad commissioner who shall be holder of "any stock or bond of any railroad company; or be the agent or employee of any such company; or have any interest in any way in such company; or in case any one of them shall become disqualified to act." It is alleged that a certain hotel property, known as Round Knob, is jointly owned by Maj. J. W. Wilson and Col. A. B. Andrews; said Wilson being one of the railroad commissioners and said Andrews being the first vice-president of the Southern Railroad Company and its active and general political manager for this State; that this property is of little or no value, except for the hotel, and worthless as a hotel except as a railroad eating-house when so designated and patronized by the Southern Railroad Company; that this hotel has been closed for several years and has been producing no income for its owners; that you, either in your own name or in that of your mother, entered into an agreement with Messrs. Wilson and Andrews for a lease of this property for the purpose of establishing a railroad eating-house, and upon obtaining such agreement, you moved into the hotel in the month of May or June of this year and have been continuously since operating the

property for your own pecuniary profit under said agreement; that previous to your rental or lease of this property the railroad company maintained an eating-house at Hickory and another at Asheville, for the accommodation of their various passenger trains
17 going both west and east; that promptly upon your opening your hotel at Round Knob these eating-houses were discontinued, and both the western and eastern trains have been and still are stopped at your hotel for meals in pursuance of an understanding or agreement or contract between you of the one part and Messrs. Andrews and Wilson and the Southern Railroad Company of the other part.

These allegations have been made to me by many persons, and I think publication of them has been made in the public press. If they or the material substance of them be true—as to which I am expressing no opinion—then the questions to be determined are as follows:

First. Have you not become an agent or an employee of said railroad company in violation of law?

Second. Have you acquired any interest in any way in such company in violation of law?

Third. Have you become disqualified to act as a fair and impartial judge or commissioner?

Under the law the governor not only has a right, but is required to suspend a railroad commissioner who commits a breach of the statute which has been cited, and this he may do, as in other cases of executive removals, without notice to the party interested; but I shall not pass judgment or decide this matter until you have a full opportunity to be heard by way of denial or explanation or justification or other defence. You will, therefore, please show cause in writing on or before Wednesday, the first day of September, 1897, at the executive office in Raleigh, why you should not be suspended from your said office and a report thereof made to the next General Assembly according to law. On the return day of this notice you will please make answer and proofs in writing and be there in person, or by counsel, at your election.

DANIEL L. RUSSELL,
Governor of North Carolina.

And on the 1st day of September, 1897, the defendant sent to the governor aforesaid the following reply to the said communication:

RALEIGH, N. C., *September* 1, 1897.

Hon. Daniel L. Russell, governor of North Carolina.

SIR: Replying to your notice of the 24th of August to show cause why I should not be suspended from the exercise of the duties of my office as railroad commissioner, I have this to say:

I have no interest in any way in the Southern Railway Company, or any other company or corporation over which the railroad commission has jurisdiction.

I am not in any way interested in the eating-house at Round

Knob. I rented the house for my mother—the rent she pays being repairs to the house for the first year, with an option to rent for five years at $250 per year. I have paid my board for myself and family, and have not and am not to receive one cent from the profits of the house. When at home I have rendered my mother such service as I could in managing the house, and the same services have been performed by other members of the family.

The arrangements to have the trains stopped at Round Knob for dinner was made by the railroad authorities upon their own motion, and is determinable by the Southern Railway Company at any time.

I have been owing my mother several hundred dollars borrowed money for several years, and I have purchased furniture and supplies for the Round Knob house and charged same to her in part payment of my debt.

I have no knowledge of the discontinuance of dinner-houses at Asheville and Hickory. They were not closed in consequence of an agreement with my mother to make Round Knob a dinner-house.

18 That a month before the notice of the governor was received this affiant had seen Messrs. Wynne & Ellington, of this city, relative to renting a house for the purpose of bringing his family back to Raleigh. That since that time and before the notice of the governor was received, the contract of renting was completed, and the affiant and family are now living therein.

That affiant and family went to Round Knob for the summer because his wife had been in bad health and the family physician advised this change for the benefit of Mrs. Wilson.

Wherefore I say:

First. That I have not become agent or an employee of the Southern Railway Company.

Second. That I have not acquired any interest in any way in the Southern Railway Company.

Third. Not having any interest in any way in the Southern Railway Company, or any other company or corporation over which the railroad commission has jurisdiction, I have not become disqualified to act as a fair and impartial judge or commissioner.

In support hereof I submit the statements of my mother, Mrs. Mary J. Wilson, Col. A. B. Andrews, Maj. J. W. Wilson, Messrs. Wynne & Ellington, and Dr. A. W. Goodwin.

And in addition to this sworn statement of facts, I respectfully refer to my record as commissioner as proof conclusive that I am not, and have not been, influenced by any railroad company, or any other company or corporation, over which the railroad commission has jurisdiction.

I suppose that in due course of law, after reading the absolute and unqualified denials of this answer, supported and corroborated by the affidavits herewith filed, that the unsupported charges against me of a partisan press and malicious meddlers, will be immediately dismissed as without foundation and wilful and maliciously false.

If I am mistaken in the view of your decision, then I demand to confront my accusers and cross-examine the witnesses against me.

Very respectfully, S. OTHO WILSON.

STATE OF NORTH CAROLINA, }
McDowell County. }

To whom it may concern:

I see it stated that S. Otho Wilson, my son, a railroad commissioner for North Carolina, is charged with being an agent and employee of the Southern Railway Company, in that he is the lessee of the Round Knob hotel on said Southern railway.

I am a widow and have only one son. I have, while able, earned my own livelihood, and have been engaged in keeping hotels for the past thirty years, though not continuously.

I am the sole lessee of the Round Knob Hotel property, the same being rented from Maj. Jas. W. Wilson, of Burke county.

My son, S. Otho Wilson, and his family have been guests of my hotel from May 1 to August 23, 1897, and have paid their board. My son has, while here, aided me in every way he could, by managing any affairs for us that he could. He has bought supplies, furniture, etc., and has paid for same out of receipts, in part, but largely with money he paid of his own, the same being a credit on notes held by me against him, which he owed me for money loaned him.

I hope he will never be so undutiful a son as not to look after the interests of a widowed mother.

(Signed) M. J. WILSON.

19 AUGUST 31, 1897.

A. W. Goodwin, M. D., being duly sworn, deposeth and says:

First. That his occupation is that of a practicing physician and a member of the Raleigh Academy of Medicine, residing in the city of Raleigh, N. C.

Second. That he is a regular physician in attendance upon the family of S. Otho Wilson.

Third. That the health of the wife of S. Otho Wilson has been feeble for the past twelve months.

Fourth. Owing to the condition of her health, I advised her removal to the mountains of North Carolina for the summer, which advice was followed.

Fifth. That I have been attending Mrs. Wilson recently, and that upon my advice (she intending to move to Raleigh about September 1) Mr. Wilson removed his family back there the past week.

(Signed) A. W. GOODWIN, M. D.
D. H. YOUNG, *C. S. C.*

September 1, 1897.

RALEIGH, N. C., *August* 31, 1897.

To whom it may concern:

On July 26, 1897, S. Otho Wilson applied to us for the rent of a house in West Raleigh, N. C., and we did not at the time have one,

but he understood that we would have one soon near the college, and after several calls on us we rented him the house in West Raleigh, near the A. & M. college, which he now occupies.

Yours truly,

(Signed) WYNNE, ELLINGTON & CO.,
Insurance and Real-estate Agents.

A. B. Andrews, being duly sworn, says:

That he is a citizen of Raleigh, N. C., and first vice-president of the Southern Railway Company; that he owns one-fourth interest in the Round Knob Hotel property and the ten acres on which it is located, and that Maj. J. W. Wilson did own the other three-fourths; that the lease for the same — to Mrs. M. J. Wilson, and affiant had no connection whatever with it, and did not know of it until after the contract was completed; that the arrangement for the passenger trains to stop at Round Knob was made because there was dissatisfaction with the dinner-house at Asheville, and the company was considering the propriety of building an eating-house somewhere on the line between Asheville and Old Fort. An additional reason for re-establishing the dinner-house at Round Knob (where it has been for most of the time for twelve years or more) was that, according to the schedule, it was more convenient for the passengers on both trains. The train from Salisbury arrived at Round Knob at 12.50 and the train from Asheville at 12.55 p. m.; that so far as this affiant knows, Mr. S. Otho Wilson has no connection with the hotel, and had nothing whatever to do with the lease of the hotel to his mother (who, as affiant knows, has long been engaged in keeping a boarding-house and hotel) or with the arrangement by which the trains stop there for dinner; that Mr. S. Otho Wilson has no interest, legal, financial or otherwise, in the Southern railway, or that he had any before or since he was elected one of the railroad commissioners, so far as the affiant has any knowledge or information. The same is true of Major Wilson.

(Signed) A. B. ANDREWS.

Sworn and subscribed to before me this 30th day of August, 1897.

(Signed) D. H. YOUNG, *C. S. C.*

20 And on the 23d day of September, 1897, the said governor of North Carolina issued and sent to the defendant the following communication and order:

EXECUTIVE DEPARTMENT, RALEIGH, N. C., *Sept.* 23, 1897.

To S. Otho Wilson, railroad commissioner.

SIR: Take notice that, after due investigation and consideration, I am convinced that you have violated the railroad commission law in some of the particulars mentioned in my letter to you August 24th, 1897, and that you have not only violated said act in the specifications set out in said act, but that you have otherwise, within the meaning and intent and words of said act, "become disqualified to act."

Now, therefore, in obedience to the duty imposed upon me by

said act of assembly, I do hereby suspend you from the office of railroad commissioner—such suspension to continue until the question of your removal or restoration shall be determined "by a majority of the General Assembly, in joint session."

The fact of your suspension, together with the reasons therefor, and the evidence, documents and information connected therewith, will be reported to the next General Assembly.

You will further take notice that under and by virtue of the powers conferred and the duties imposed by the law upon the chief executive, I have appointed John H. Pearson, Esq., of the county of Burke, to fill the vacancy created by your suspension.

Inasmuch as you are understood to deny the power of the executive to suspend you from office, as provided by the statute, I have requested Mr. Pearson to make demand on you for the possession of the office, and upon your refusal, to bring action therefor, to the end that the title to the office may be judicially determined.

D. L. RUSSELL, *Governor.*

To which he received the following reply:

NORTH CAROLINA RAILROAD COMMISSION,
RALEIGH, *Sept.* 24, 1897.

To Dan'l L. Russell, governor.

SIR: Yours of the 23d received and noted.

S. OTHO WILSON,
Railroad Commissioner.

4. And, therefore, the relator avers and so charges, on information and belief, that on the 23d day of September, 1897, his excellency, Daniel L. Russell, governor of North Carolina, in pursuance of the power and authority vested in him by sec. 1, of chap. 320, of the Laws of the State of North Carolina, passed by the General Assembly at its session of 1891, ratified the 5th day of March, 1891, and in execution of the duty devolved upon him by the said act, suspended the said S. Otho Wilson from the said office of railroad commissioner. And on said 23d day of September, 1897, the said governor of North Carolina appointed the plaintiff's relator, John H. Pearson, a railroad commissioner, to fill the vacancy caused by the suspension of the said S. Otho Wilson from said office, from the said 23d day of September, 1897, to continue until the next General Assembly shall determine the question of the removal of said S. Otho Wilson, or until his successor shall be elected and qualified according to law.

5. That the plaintiff's relator has duly qualified as railroad commissioner as aforesaid, by taking the oaths prescribed by law.

6. That the plaintiff's relator, since his appointment and qualification as aforesaid, and before the commencement of this action, demanded of the said S. Otho Wilson that he, the said S. Otho Wilson, should vacate the said office of railroad commissioner, and surrender the same to the relator, and the said S. Otho Wilson refused to vacate and surrender the said office to the relator.

21 7. That the defendant, notwithstanding his suspension from the office of railroad commissioner by the governor of North Carolina, as hereinbefore stated, refuses to vacate the same, and does now unlawfully usurp, intrude into, hold and exercise the said office of railroad commissioner, and does prevent and hinder the relator from performing the duties of said office.

8. That the said office of railroad commissioner is an office of trust and profit under the laws of North Carolina.

9. That this action is brought by leave of the attorney general of said State.

Wherefore plaintiff demands judgment:

1. That the defendant has been suspended from his office of railroad commissioner according to law.

2. That the defendant be adjudged guilty of unlawfully holding and exercising said office, and that he be fined $2,000, pursuant to the statute.

3. That the relator has been duly appointed to fill the vacancy caused by the suspension of the defendant, and is entitled to hold and exercise the said office.

4. That the defendant be ousted from, and the relator inducted into, said office.

5. For such other and further relief in the premises as may be right. And for the costs of this action.

MACRAE & DAY,
Attorneys for Plaintiff's Relator.

NORTH CAROLINA, }
Burke County. }

John H. Pearson, being duly sworn before me, says: That he is the relator herein; that the facts set forth in the foregoing complaint are true, except as to those matters which are stated upon information, and as to them he believes it to be true.

JNO. H. PEARSON.

Sworn to and subscribed before me this 1st day of October, 1897.

M. SILVER,
Notary Public.

NORTH CAROLINA, }
Wake County. }

Superior Court, October Term, 1897.

THE STATE OF NORTH CAROLINA, by ZEB. V. WALSER, Attorney General, on the Relation of John H. Pearson, *v.* S. OTHO WILSON. } Answer.

The defendant, answering the complaint of the plaintiff, says:

1. That he admits to be true the facts alleged in the first section thereof.

2. That the allegations made in the second section are true, except that the defendant was elected railroad commissioner by the

General Assembly, at its session of 1895, for the term of six years from the first of April, 1895, to the first of April, 1901.

3. That section 3 of the complaint is admitted.

4. That section 4 of the complaint is denied. But defendant admits that the governor undertook, or attempted to suspend or remove the defendant from his said office of railroad commissioner, and designated the plaintiff's relator, John H. Pearson, to fill the vacancy which he had attempted to create.

5. That the allegations made in section five of plaintiff's complaint are not true. He admits that said Pearson has taken the oath prescribed by law for railroad commissioner.

6. That defendant admits section six of the complaint, except that he does not admit the appointment and qualification of said Pearson any further than he has hereinbefore admitted the same.

7. That he denies section seven of the complaint, but he admits that he refuses to vacate his office of railroad commissioner and to surrender the same to the relator. The defendant is advised that his suspension was illegal, and that he is still entitled to discharge the duties of his office.

22 8. That the facts alleged in section- eight and nine of plaintiff's complaint he admits to be true.

9. That the General Assembly of North Carolina, at its session of 1891, under the authority of the constitution of the State, articles 4, sections 2, 12 and 30, passed an act constituting a railroad commission, with the powers of a court, which was ratified the 5th of March, 1891, and under said act defendant was elected a member thereof at the session of 1895 for the term of six years, and on the 9th March, 1891, the General Assembly of North Carolina passed an act declaring "that the railroad commission elected at this session of the General Assembly, and their successors in office, be and they are hereby created and constituted a court of record, inferior to the supreme court, and shall be known as the board of railroad commissioners, and as such, shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects embraced in the act creating such railroad commission.

10. That the act ratified March 5th, 1891, in section 1 thereof provides, "That said commissioners shall not jointly or severally, or in any way, be the holder of any stock or bonds, or the agent or attorney or employee of any such company, or have any interest in any way in such company, and shall so continue during the term of his office; and in case any commissioner shall, as distributee or legatee, or in any other way, have or become entitled to any stock or bonds, or interest therein, of any such company, he shall at once dispose of the same, and in case any commissioner shall fail in this, or in case any one of them shall become disqualified to act, then it shall be the duty of the governor to suspend him from office, and to report the fact of his suspension, together with the reason therefor, to the next General Assembly, and the question of his removal from office shall be determined by a majority of the General Assembly in joint session. In any case of suspension the governor shall fill the vacancy, and if the General Assembly shall determine that the com-

missioner suspended shall be removed, then the appointee of the governor shall hold until his successor is elected and qualified, as hereinbefore provided; but if the General Assembly shall determine that the suspended commissioner shall not be removed from his office, then the effect shall be to reinstate him in said office. The person discharging the duties of said office shall be entitled to the salary for the time he is so engaged, but a commissioner who is suspended shall be allowed the salary during his suspension, in case he should be reinstated by the next General Assembly: Provided, that no person is eligible as such commissioner who shall have been an attorney of any such company within twelve months next preceding his election to such office." But the defendant avers, being so advised, that said provisions are unconstitutional and void.

11. That as appears by the complaint, the said Daniel L. Russell, governor, preferred the charges contained in his communication of August 24th, 1897, which *is* set out in section three of complaint. The defendant appeared before the said governor at the day fixed, and filed a written denial of said charges with affidavits in confirmation of said answer, as appears from section three of said complaint. And thereupon the defendant demanded of the said governor that the evidence against him be produced, and that he have an opportunity to confront his accusers and cross-examine the witnesses. This was refused, the governor stating that he had no power to subpœna witnesses.

12. That notwithstanding the denials of the defendant, and the affidavits in support thereof, the said governor, without evidence and without a trial, undertook to find generally that the defendant had violated the railroad commission law, in some of the particulars mentioned in his letter of August 24th, 1897, and that defendant had not only violated the said act in the specifications set out in said act, but that he had otherwise, within the meaning
23 and intent and words of said act, become disqualified to act. Thereupon, the said governor, without a more specific finding, undertook to suspend the defendant and deprive him of his said office.

13. That this defendant denies that he leased the Round Knob hotel, or had or has any interest therein; he further denies that he ever operated said property for his own pecuniary profit, and that the trains of the Southern railway are stopped there for meals in pursuance of any understanding, agreement or contract with him.

14. The defendant denies that he is or has been an agent or employee of the Southern Railway Company in violation of law.

15. The defendant denies that he has acquired any interest in any way in the Southern Railway Company in violation of law.

16. The defendant denies that he has become disqualified to act as a fair and impartial judge or commissioner, or that he has in any way become disqualified to act.

17. That under the laws of North Carolina the defendant has a property in his office, and he demands to have the charges preferred against him tried by a jury in this action.

18. That by the constitution of the State of North Carolina, arti-

cle 6, sections 1, 2 and 3, it is provided that every male person born in the United States, and every male person who has been naturalized, twenty-one years old or upward, who shall have resided in the State twelve months next preceding the election, and ninety days in the county in which he offers to vote, shall be deemed an elector and eligible to office, except all persons who shall deny the being of Almighty God, and all persons who shall have been convicted of treason, perjury or of any other infamous crime since becoming a citizen of the United States, or of corruption or malpractice in office, unless such person shall have been legally restored to the rights of citizenship.

19. That this defendant is in every way qualified to hold office under the requirements aforesaid.

20. That the defendant is advised, and so avers, that any provision of the railroad commission act, chapter 320, of the Acts of the General Assembly of North Carolina, passed at the session of 1891, which prescribed other and different qualifications for the office of railroad commissioner than those laid down by the said provisions of the constitution, are unconstitutional and void.

21. That the board of railroad commissioners is a court of record, and the commissioners are judges under and by virtue of article 4, section 12, of the constitution of the State by which it is provided: "The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government, but the General Assembly shall allot and distribute that portion of this power and jurisdiction, which does not pertain to the supreme court, among other courts prescribed in the constitution, or which may be established by law in such a manner as it may be deemed best, provide also a proper system of appeals, and regulate by law, when necessary, the method of proceeding, in the exercise of their powers, of all the courts below the supreme court, so far as the same may be done without conflict with other provisions of this constitution."

22. That by article 4, section 30, of the State constitution, it is further provided: "In case the General Assembly shall establish other courts inferior to the supreme court the presiding officers and clerks thereof shall be elected in such manner as the General Assembly may, from time to time, prescribe, and they shall hold their offices for a term not exceeding eight years."

23. That by article 4, section 31, of the State constitution, it is further provided: "Any judge of the supreme court, or of the
24 superior court, and the presiding officers of such courts inferior to the supreme court as may be established by law, may be removed from office for mental or physical inability upon a concurrent resolution of two-thirds of both houses of the General Assembly. The judge or presiding officer against whom the General Assembly may be about to proceed, shall receive notice thereof, accompanied by a copy of the causes alleged for his removal, at least twenty days before the day on which either house of the General Assembly shall act thereon."

24. That the alleged causes of removal set up by the governor are

such as apply to no other judges or presiding officers of courts in the State, and the governor has no power to remove or suspend any other judge or presiding officer of courts, or any other officer not appointed by him. Wherefore, the defendant says that the statute and the said action of the governor deprive him of the equal protection of the laws, and are in violation of the fourteenth amendment of the Constitution of the United States, and this defendant expressly claims the protection of said amendment.

25. That, as appears by section three of the complaint, the governor cited this defendant before him to answer the charges preferred against him; this defendant fully answered and generally and specially denied the charges. Thereupon the defendant demanded to be confronted with his accusers, and to hear and cross-examine the witnesses against him. This was refused, no evidence was produced, and thereafter the governor made his decision by which he attempted to suspend or remove the defendant till the meeting of the General Assembly early in January, 1899. The defendant submits that this action was without a hearing and without evidence to support it, without any trial and without any right of appeal; wherefore, he says, that the action was without due process of law and in direct conflict with the fourteenth amendment to the Constitution of the United States, and the defendant expressly claims the protection of said amendment.

26. That the defendant submits to the court whether, by the action of the governor aforesaid, the privileges and immunities of defendant as a citizen of the United States have been abridged, in violation of the fourteenth amendment to the Constitution of the United States, and he expressly claims the protection of said amendment.

27. That the defendant is advised that the General Assembly had no power to confer upon the governor the right of removal or suspension, nor to confer upon itself the power thereafter to pass upon the question of removal or restoration, nor to add to the qualifications for holding office. And the defendant further submits that the matters and things charged against him, and which he fully denies, do not come within the provisions of the act of General Assembly, and do not warrant the action of the governor.

28. The defendant submits, being so advised, that the action of the governor was illegal and void and the defendant is entitled to continue in the exercise of the duties of his office.

Wherefore the defendant prays judgment that he go without day and recover of the plaintiff his costs of action.

SPIER WHITAKER,
J. C. L. HARRIS,
R. O. BURTON,
Attorneys for Defendant.

WAKE COUNTY:

S. Otho Wilson, being duly sworn, says that the foregoing answer is true of his own knowledge, except as to those matters stated on

information and belief, and as to those matters, he believes it to be true.

S. OTHO WILSON.

Sworn to and subscribed before me this 15th day of October, 1897.
D. H. YOUNG, *C. S. C.*

25 NORTH CAROLINA, *Wake County.*

Superior Court, October Term, 1897.

THE STATE OF NORTH CAROLINA, by ZEBULON V. Walser, Attorney General, on the Relation of John H. Pearson, Railroad Commissioner,
v.
S. OTHO WILSON. } Judgment.

This cause, coming on for hearing, the plaintiff's attorneys, Messrs. MacRae & Day and A. C. Avery, moved for judgment on the complaint and answer. Thereupon, it is ordered, adjudged and decreed:

First. That the defendant has been lawfully suspended from his office of railroad commissioner.

Second. That the relator, John H. Pearson, has been duly appointed to fill the vacancy caused by the suspension of the defendant.

Third. That the defendant be ousted from, and the relator be inducted into, said office of railroad commissioner.

Fourth. That plaintiff recover the costs of this action, to be taxed by the clerk.

W. S. O'B. ROBINSON,
Judge Presiding.

Rule for new trial for errors alleged. Rule discharged. Exceptions by defendant. Judgment.

Appeal by S. Otho Wilson to supreme court. Notice of appeal accepted. Appeal bond fixed at $25. Supersedeas bond fixed at $100.

WAKE COUNTY:

In the Superior Court.

STATE OF NORTH CAROLINA, by Z. V. WALSER, Attorney General, on the Relation of John H. Pearson, Plaintiff,
against
S. OTHO WILSON, Defendant. } This 13th Day of November, 1897.

Whereas, on the 2d day of November, 1897, judgment was rendered in favor of the plaintiff and against the defendant in this action;

And whereas, the appellant intends to appeal from said judgment to the supreme court:

Now, therefore, we, S. Otho Wilson, of the county of Wake, and Jos. J. Rogers, undertake, pursuant to the statute, that the said appellant shall pay all costs and damages that may be awarded against him on such appeal, not exceeding twenty-five dollars.

S. OTHO WILSON.
JOS. J. ROGERS.

Justification of Sureties.

WAKE COUNTY, *sct:*

Jos. J. Rogers, above named, being duly sworn, says, that he is a resident of the State of North Carolina, and worth double the sum specified in the above undertaking, over all his debts and liabilities, and exclusive of property exempt from execution.

JOS. J. ROGERS.

Sworn and subscribed before me this 13th day of November, 1897.

D. H. YOUNG, *C. S. C.*

26 NORTH CAROLINA, *Wake County.*

Superior Court, October Term, 1897.

STATE OF NORTH CAROLINA, by ZEB. V. WALSER, Attorney General, on Relation of John H. Pearson,
against
S. OTHO WILSON.
} Statement of Case on Appeal.

Action in the nature of *quo warranto*, tried at October term, 1897, of Wake superior court, before Robinson, J.

At the conclusion of the reading of the pleadings, the defendant tendered the following issues and demanded a trial by jury :

1. Did the defendant lease the Round Knob hotel?
2. Had or has he any interest therein?
3. Has the defendant ever operated said property for his own pecuniary profit?
4. Are the trains of the Southern railway stopped at said hotel for meals in pursuance of any understanding, agreement or contract with him?
5. Is the defendant, or was he on the first of September, 1897, an agent or employee of the Southern Railway Company in violation of law?
6. Has the defendant acquired any interest in any way in the Southern Railway Company, in violation of law?
7. Has the defendant become disqualified to act as a fair or impartial judge or commissioner, or has he in any way become disqualified to act?
8. Did the defendant demand of the governor that he be confronted with his accusers, and that he have an opportunity to hear and cross-examine the witnesses against him?

9. Was said demand refused?

10. Was any evidence produced?

Exception 1. The court declined to submit these issues, or any issues, and the defendant excepted.

Exception 2. Thereupon the plaintiff moved for judgment upon the complaint and answer. Upon argument of this motion, the defendant, among other contentions, insisted that the Statute Laws of North Carolina, session of 1891, chapter 320, section 1, and the action of the governor set out in the pleadings, deprived him of the equal protection of the laws, and deprived him of his office without due process of law, as set out in the answer, and therefore said statute and action were in violation of the fourteenth amendment to the Constitution of the United States, and he expressly claimed the protection of said amendment. This contention was disallowed, and the defendant excepted.

Exception 3. The court ruled that the plaintiff was entitled to judgment upon the pleadings, and the defendant excepted.

Exception 4. Rule for a new trial for the foregoing alleged errors. Rule discharged. Defendant excepted.

Exception 5. Judgment as set out in the record. Defendant excepted, and appealed to the supreme court.

Notice given and accepted in open court. Appeal bond fixed at $25, and filed and approved. Supersedeas bond fixed at $100, and filed and approved.

SPIER WHITAKER,
J. C. L. HARRIS,
R. O. BURTON,
Attorneys for Defendant.

NORTH CAROLINA, }
Wake County. }

I, D. H. Young, clerk of the superior court of the county and State aforesaid, do hereby certify that the foregoing contains a full, true and perfect transcript of the record in the case of The State of North Carolina, by Z. V. Walser, attorney general, on the relation of John H. Pearson, railroad commissioner, against S. Otho Wilson.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office, in Raleigh, N. C., this 2 day of Dec., A. D. 1897.

[L. S.]

D. H. YOUNG,
Clerk Superior Court.

27 Entries of record.—Appeal docketed December 2, 1897; cause advanced under rule 13 and argued on December 4 with the case of Caldwell *vs.* Wilson, and the following opinion and judgment handed down on December 23, in the afternoon, about 4.30:

28 N. C. Supreme Court, Sept. Term, 1897, Wake Co.

STATE *ex Rel.* J. H. PEARSON
vs.
S. OTHO WILSON, Appellant. } # 160 "A."

R. O. Burton, Spier Whitaker, and J. C. L. Harris, for appellant. MacRae & Day and A. C. Avery, for appellee.

DOUGLAS, *J.*:

The facts in this case are substantially similar to those in Caldwell *vs.* Wilson, and the questions of law are identical. For the reasons given in that case the judgment in this case in the court below is affirmed, and judgment will be entered here that the relator Pearson is entitled to the office of railroad commissioner, now held by the defendant Wilson; that the defendant is not entitled thereto, and that he be ousted therefrom, and that the relator Pearson be placed in the possession of said office, with all its records and appurtenances thereunto rightfully belonging.

Affirmed.

Endorsed: 160 A. Pearson *v.* Otho Wilson. D. Wake.

29 *Judgment.*

This cause coming on to be heard in the supreme court and having been decided in favor or the plaintiff, it is adjudged and decreed:

1. That the defendant has been lawfully suspended from the office of railroad commissioner.

2. That the relator has been duly appointed to fill the vacancy caused by the suspension of the defendant.

3. That the defendant be ousted from and the relator be inducted into said office of railroad commissioner.

Therefore let a writ issue out of this court, directed to the sheriff or other lawful officer of Wake county, commanding him to oust the defendant and put the relator in possession of the rooms occupied as offices by the railroad commissioners, in the Agricultural building, on Edenton street, in Raleigh, and known as the railroad commission offices, together with all property, paper, and effects appertaining or belonging to said offices.

That the plaintiff relator recover the costs of this action, to be taxed by the clerk of this court.

WALTER CLARK,
Justice Supreme Court.

30 *Entry of Record.*

At 5.30 p. m. on December 23 the plaintiff, through his counsel, William H. Day, obtained a writ of execution, directed to the sheriff of Wake county, in the following words:

(Title of Cause.)

Supreme Court of N. C., Fall Term, 1897.

The State of North Carolina to the sheriff of Wake county, Greeting:

Whereas in the above-entitled cause it was adjudged at this term that the defendant wrongfully withholds possession of the office of railroad commissioner from the plaintiff relator, and that plaintiff relator is entitled to the possession of the same, these are therefore to command you forthwith to put the relator in possession of the rooms occupied as offices by the railroad commissioners, in the Agricultural building, on Edenton street, and known as the railroad commission offices, together with all property, papers, and effects appertaining or belonging to said offices, and to oust the defendant from said office and to induct the plaintiff's relator into the same, and you shall make due return thereof on the first day of the next term of this court.

Witness this 23rd day of December, 1897.

By the court:

[L. S.] THOS. S. KENAN, *S. C. C.*

31 North Carolina Supreme Court, December 24, 1897.

The plaintiff, through his counsel, William H. Day, mowed (orally) in open court to set aside the supersedeas proceedings or adjudge them irregular, and the counsel for the defendant submitted the following motion:

To the honorable the supreme court of North Carolina:

The defendant respectfully shows to the court that judgment herein was rendered in the afternoon of Thursday, December 23, 1897; that execution thereon was issued by the clerk of this court to the sheriff of Wake county about 5.30 o'clock p. m. on the same day, but has not been executed; that the defendant's counsel sued out a writ of error to the Supreme Court of the United States, which was duly issued by the clerk of the United States circuit court for the eastern district of North Carolina and was allowed by the chief justice of this court on the same day; that the defendant also gave a good and sufficient bond in a penal sum fixed by his honor the chief justice, conditioned as a supersedeas bond, and he duly approved said bond and signed the citation; that at 7.10 o'clock p. m. the defendant's counsel filed said writ of error and bond in the clerk's office of this court, and at the same time lodged therein a copy of said writ of error for the State of North Carolina and a copy for John H. Pearson and a copy for Z. V. Walser, attorney general. The defendant submits to the court that the judgment of the court is superseded, and he respectfully asks that the said execution be recalled.

J. C. L. HARRIS,
R. O. BURTON,
SPIER WHITAKER,
For Defendant.

This 24th December, 1897.

On the same day, December 24, the following opinion was handed down:

32 CLARK, *J.*:

This is a motion by defendant to recall the execution which issued to put the relator in possession of the furniture, rooms, and other tangible property belonging to the railroad commission. The relator moved to set aside the supersedeas proceedings or adjudge them irregular. We are of opinion that we have no power to set aside the writ of error or pass upon the regularity thereof. We are also of opinion that the judgment of this court, *ex proprio vigore*, placed the relator in possession of the office at the time the judgment was filed. He having already qualified, no process was necessary for that purpose. He is in full possession of the same and entitled to exercise its duties and draw the salary thereto attached from the date of his appointment. The judgment took effect immediately upon being filed and is not superseded by the subsequent writ of error, regular or irregular. Foster *vs.* Kansas, 112 U. S., 201. The relator being in office by virtue of the judgment of this court, any attempt by the defendant to exercise its functions or to interfere with the full and free exercise thereof by the relator and any attempt by any one else to interfere, by alleged legal process or otherwise, unless and until the Supreme Court of the United States shall reverse the judgment of this court, will be a contempt of this court. We decline to make any order recalling the execution.

Both motions refused.

33 North Carolina Supreme Court.

I, Thomas S. Kenan, clerk of the supreme court of the State of North Carolina, do hereby certify the foregoing to be a full, true, and correct transcript of the action entitled State of North Carolina, by Zeb. V. Walser, attorney general, on relation of John H. Pearson, *against* S. Otho Wilson as appears of record in this court.

In witness whereof I have hereto set my hand and affixed the seal of said court, at office, in Raleigh, this 29th day of December, 1897.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN, *S. C. C.*

Endorsed on cover: Case No. 16,772. North Carolina supreme court. Term No., 559. S. Otho Wilson, plaintiff in error, *vs.* The State of North Carolina, by Zeb. V. Walser, attorney general, on the relation of John H. Pearson. Filed January 4th, 1898.

No. 558.

JAN 8 1898
JAMES H. McKENNE
CLE

824
S. C.

No. 558.

UNITED STATES OF AMERICA,

IN THE SUPREME COURT.

JAMES W. WILSON, PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA ON THE RELATION OF L. C. CALDWELL, DEFENDANT IN ERROR.

To the Honorable the Supreme Court of the United States:

The petition of James W. Wilson, plaintiff in error in this cause, respectfully showeth—

1. That there is involved in this action a contest over the office of Railroad Commissioner for the State of North Carolina and the Chairmanship of the Board of Railroad Commissioners.

2. That the Governor of North Carolina undertook to suspend your petitioner from his said office and fill his place with the relator, L. C. Caldwell; that upon your petitioner's refusal to surrender his office upon the action of the Governor—which he considered and still considers illegal—the present action, in the nature of *quo warranto*, was brought; that upon the trial in the Superior Court of Iredell County the issues tendered by your petitioner were excluded, and the Court gave judgment for the plaintiff. Thereupon your petitioner appealed, and a *supersedeas* bond was filed and accepted, and your petitioner continued to discharge the duties of his office.

3. That judgment in the Supreme Court of North Carolina was rendered about 4.30 o'clock p. m. on the 23d day of December, 1897; that a writ of possession was issued to the Sheriff of Wake County at 5.30 o'clock on said day, commanding the said Sheriff to eject your petitioner from the rooms of the Railroad Commission and to put the relator in possession thereof and of the books and papers of said office, and to make return to the February Term, 1898, of said Court; that said writ of possession has never been executed.

4. That the counsel of your petitioner sued out a writ of error, returnable to this Court, which was issued by the Clerk of the United States Circuit Court for the Eastern District of North Carolina, and was duly allowed by the Chief Justice of the Supreme Court of North Carolina on the said 23d day of December, 1897. The said counsel duly tendered a good and sufficient bond, conditioned as required by law in cases of *supersedeas*, and the Chief Justice of the said State Supreme Court duly approved the same and signed the citation on said 23d day of December, 1897. Thereupon, at 7.10 o'clock p. m. on said day, the said writ of error, with the petition therefor, and the assignment of errors and the said citation and bond, were filed in the Clerk's office of the said Supreme Court, and at the same time copies of said writ of error were lodged in said Clerk's office for the State of North Carolina and for the relator, Caldwell. A few minutes thereafter one of your petitioner's counsel saw W. H. Day, Esq., acting as counsel for the relator, and told him that the *supersedeas* had been granted, whereupon the said Day went into the said Clerk's office and asked to see the bond, which was at once handed to him, and he examined the same. The Railroad Commission rooms and the Supreme Court Clerk's office are in adjoining buildings, about ten or twenty feet apart, and the Clerk of the Supreme Court lives about two hundred yards off.

On information and belief, the Clerk of the Supreme

Court, in a few minutes after the lodging of said copies of the writ of error, sent by his deputy the copy lodged for the State of North Carolina to Daniel L. Russell, Governor of said State, and it was promptly delivered to him. The said deputy was unable to find the said Caldwell and Pearson, the latter being engaged in a similar contest with S. Otho Wilson, but showed the copies for them to W. H. Day., Esq., their counsel, and he read the same several hours prior to the forcible entrance into said rooms, hereinafter set forth.

Further, on information and belief, your petitioner says that the said Governor, after the copy of the writ of error was handed him and with full knowledge of the *supersedeas*, sent for a locksmith and sent him with the said Caldwell and Pearson, with instructions to pick the locks on the doors of said Commission rooms, and open the doors. Said locksmith did so, and said Caldwell and Pearson at once entered and took possession about 11.30 o'clock p. m., on said 23d December, 1897, and had new locks put on and have since remained in possession.

On information and belief, the said Caldwell and Pearson well knew of the action of the Chief Justice in the premises, and took possession as aforesaid after conference with the Governor. The home of their counsel, Mr. Day, is in about fifty yards of the said Commission rooms.

5. That on the morning of the 24th December, 1897, the said W. H. Day, Esq., as counsel for the relator, made a motion in open Court to set aside said *supersedeas;* and at the same time your petitioner made a motion that said execution or writ of possession be recalled on account of the *supersedeas.* Both motions were refused, and the Justice delivering the opinion warned all persons against interfering with the said Caldwell and Pearson and announced that they would be in contempt of the Supreme Court of the State if they molested or disturbed them in the office or the discharge of the duties of the same. Since said time the

said Caldwell and Pearson have begun to discharge the duties of the office, and have held a regular meeting for the transaction of businesss, and your petitioner is unable to assert his rights on account of the threat against him in the said opinion filed and which is here referred to for greater certainty.

6. Your petitioner has filed a full and complete transcript of the record of said case, and he prays that the same be referred to for a fuller statement of the facts of the controversy and the said proceedings.

Wherefore your petitioner prays that the said L. C. Caldwell may be compelled to desist from the discharge of the duties of said office, and that the said rooms and books and papers of the office be restored to your petitioner; that the said L. C. Caldwell be adjudged to be in contempt of this honorable Court, and that your petitioner be restored to his position; and for such other and further relief as may be just. And your petitioner will ever pray.

R. O. Burton,
Attorney for Petitioner.

United States of America,
Eastern District of North Carolina.

James W. Wilson, being duly sworn, says the foregoing petition is true, of his own knowledge, except as to allegations therein made on information and belief. As to those matters, he believes it to be true.

James W. Wilson.

Sworn to and subscribed before me, this 1st day of January, 1898.

[L. S.] N. J. Riddick,
Clerk U. S. Circuit Court Eastern District N. C.

IN THE SUPREME COURT OF THE UNITED STATES.

JAMES W. WILSON, *Plaintiff in Error,*
versus
THE STATE OF NORTH CAROLINA on the relation of L. C. CALDWELL, *Defendant in Error.*
} *Notice.*

To Messrs. A. C. Avery and MacRae & Day, Attorneys for Defendant in Error, and L. C. Caldwell:

Take notice, that on the foregoing petition and affidavit I shall move before the Honorable, the Supreme Court of the United States, on Monday, January 17, 1898, or as soon thereafter as counsel can be heard—

1. That the relator, L. C. Caldwell, be attached for contempt, on account of his conduct in disregard of the *supersedeas* granted in this cause.

2. That he be commanded to desist from acting as Railroad Commissioner till the decision of this controversy; and in the meantime that he restore the plaintiff to the office and turn over to him the rooms of said Railroad Commission, with all the books, papers and property pertaining to said office.

3. That a writ of restitution be granted to restore said plaintiff in error to said office.

4. That a writ issue to the Sheriff of Wake County, commanding him to proceed no further with the writ of possession in his hands.

5. For such other and further relief as the nature of the case may require.

This January 6, 1898.

R. O. BURTON,
Attorney for Plaintiff in Error.

No. 558.

Brief of Burton for P. E. (me

Filed Jan. 17, 1898.

FILED
JAN 17 1898
JAMES H. McKENNEY,
CLE

No. 558.

UNITED STATES OF AMERICA,

IN THE SUPREME COURT.

OCTOBER TERM, 1897.

JAMES W. WILSON, PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA ON THE RELATION OF L. C. CALDWELL, DEFENDANT IN ERROR.

Memorandum in Behalf of the Motion by Plaintiff in Error.

I.

Compliance with the Act of Congress operated as a supersedeas.

Slaughterhouse Cases, 10 Wall, 273.
Goddard *v.* Ordway, 94 U. S., 672.

II.

The jurisdiction of the State Court ceased when the writ was allowed and bond accepted.

Draper *v.* Davis, 102 U. S., 370.
Keyser *v.* Farr, 105 U. S. 265.

III.

The doctrine as to supersedeas applies in quo warranto cases as in others.

United States *v.* Addison, 22 How., 174.
Coms. *v.* Gorman, 19 Wall, 661; also 86 U. S. (Lawyer's Coop. Ed.), 148.
Foster *v.* Kansas, 112 U. S., 201.

IV.

The Court will mould its order to suit the exigency of the case. It has a right to issue any writ which may be necessary to render its appellate jurisdiction effective.

Rev. Stat. sec. 716.
Ex parte The Milwaukee Railroad Co., 5 Wall, 188.
Goddard *v.* Ordway, 94 U. S., 672.

V.

As to the writ of possession.—Where a writ of error, bond and citation were in due season to operate as a *supersedeas*, and an execution was issued from the lower court notwithstanding, the Supreme Court issued a *supersedeas* to supersede and quash the execution.

Stockton *v.* Bishop; 2 How., 74.

So the writ was issued in Green *v.* Van Buskerk, 3 Wall, 448, where the execution had been issued, and placed in the Sheriff's hands.

VI.

But the State Court says that its judgment was self executing, and therefore the relator was in office as soon as it was rendered, and the *supersedeas* came too late. Foster

v. Kansas, 112 U. S., 201, is relied on. But the point in that case is that the judgment made a vacancy, and the proper authority appointed Moore to fill it on the 7th, on which day Moore qualified and entered upon the discharge of the duties of the office. The *supersedeas* went into effect on the 8th—a day too late to undo what had been done. In the present case nothing had been done except to issue a writ. We therefore have a *supersedeas* that does not supersede. The judgment is suspended. The *status quo ante decretum* is to be preserved—for such is the object of the doctrine. [Butchers Association *v.* Slaughter House Co., 1 Woods 50.] The power of the judgment is gone; yet the judgment operates to entitle the relator to the office and authorizes him to take possession by force, oust the plaintiff in error, and assume the discharge of the duties of the office. If this be true, there never can be a *supersedeas* in any case of *quo warranto*, and U. S. *v.* Addison is not law.

The opinion of the State Court as to the effect of its judgment was rendered on the 24th of December—the day after the *supersedeas* took effect. It jurisdiction was then superseded (Draper *v.* Davis, *supra*). It could recall its own execution. But it could not enforce its judgment, or take any further steps in the cause, (Goddard *v.* Ordway *supra*). Hence what it says about the effect of its judgment is the enunciation of a court without jurisdiction. It is for this Court to declare the effect of the decision and of the *supersedeas*.

Citizens Bank of Wichita *v.* Farwell, 56 Fed. Rep., 539.

VII.

The defendant in error may say he was not proceeding under any judgment—that he was not executing any judgment—but was acting independently of it. But it is too late for him to put himself on any such ground. He submitted his claims to the action of the courts by instituting pro-

ceedings in *quo warranto* and assertingh is title through the State Courts. After having won in the State Courts, it is too late for him to abandon the process of the law, when the jurisdiction of this Court has attached to the action instituted by himself. He cannot be allowed to say "I stand by the law as long as it stands by me; but when I am carried to another Court, I abandon the whole thing, and will be a law unto myself."

The *supersedeas* operates to prevent the successful party in the Court below from proceeding to enforce his judgment, (4 Minor's Institutes, 325); and he is none the less enforcing it when he forcibly obtains possession of the physical property and is declared by the State Court to be lawfully in possession and protected by its powers.

In general, when a *supersedeas* is allowed, the remarks of Chief Justice Marshall in Yeaton *v.* U. S., 5 Cranch, 281, are pertinent:

"The majority of the Court is clearly of the opinion that in admiralty cases an appeal suspends the sentence altogether; and that it is not *res adjudicata* until the final sentence of the appellate court is pronounced."

In discussing the history of *supersedeas*, Walworth, Chancellor, says in Hart *v.* Albany, 3 Paige Ch. Rep. (N. Y.), 383:

"During this contest it was a matter of course that the Lords for the purpose of sustaining the jurisdiction which they claimed, should prohibit the respondent from taking any steps in the cause in the Court of Chancery pending the appeal, whatever injury he might sustain by the delay."

"In many cases this power (to stay execution) operates almost as a substitute for proceedings in equity, and enables the defendant to prevent any inequitable use of the judgment or writ."

Freeman on Ex., sec. 32.

Supersedeas is a writ that lies in a great many cases, and signifies, in general, a command to stay some ordinary pro-

ceedings at law, on good cause shown, which ought otherwise to proceed.

Abbott Law Dic., citing Fitz. Nat. Brev., 236.

In the practice of the Supreme Court the meaning of the expression "the writ is a *supersedeas*" is that the writ of error operates to stay proceedings.

Abbott, *supra*.

Bouvier Law Dic.: "The name of a writ containing a command to stay the proceedings at law. 2. It is granted on good cause shown that the party ought not to proceed."

The appellate jurisdiction of this Court is not effectual, it is respectfully submitted, if the respondent can practically defy the resort to it, by taking charge of the office and assuming to discharge its duties, when his own suit to establish his title and secure his admission is still pending.

In the interest of justice and of respect for the due administration of Law the respondent should be compelled to restore the petitioner, and await the decision of this Court as he did that of the State Court.

Respectfully submitted,

R. O. BURTON,
Attorney for Plaintiff in Error.

RALEIGH, N. C., Jan. 12, 1898.

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH.

FILED
JAN 17 1898
JAMES H. McKENNEY,
CLE

No. 558.

UNITED STATES OF AMERICA,

IN THE SUPREME COURT.

JAMES W. WILSON, *Plaintiff in Error,*

versus

THE STATE OF NORTH CAROLINA, ON THE RELATION OF L. C. CALDWELL, *Defendant in Error.*

Supplemental Memorandum for Plaintiff in Error.

The following is the North Carolina statute as to *supersedeas* in *quo warranto* cases:

"In every such case (to try title to office) judgment shall be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice shall require. Whenever in any civil action brought under sections 607 and 608 of The Code, to try the title or right to hold any office, the judgment of the Court shall be in favor of the relator in such action, it shall be the duty of the Court to issue a writ of *mandamus* or other process in such action which may be necessary and proper to carry such judgment into effect, and to induct the party so entitled into such office. No appeal by the defendant from the judgment of the Superior Court in such action to the Supreme Court shall stay the execution of the judgment, unless a justified undertak-

ing be executed on the part of the appellant by one or more sureties, in a sum to be fixed by the Court, conditioned that the appellant will pay to the party entitled to the same the salary, fees, emoluments and all money whatsoever received by such appellant by virtue or under color of his said office: *Provided*, that in no event shall said judgment be executed pending said appeal, unless a justified undertaking be executed on the part of the appellee by one or more persons in a sum to be fixed by the Court, conditioned that the appellee will pay to the party entitled to the same the salary, fees, emoluments and all moneys whatsoever received by the appellee by virtue or under color of his said office during his occupancy thereof." The Code of N. C., sec, 610 as amended by Acts of 1885, ch. 406.

So by the Acts of 1895, ch. 105, sec. 1, the defendant in actions of this kind is not allowed to plead until he gives bond to cover all costs and damages.

The section of The Code (611) cited by the respondent, applies to cases where there is no appeal and *supersedeas*.

The general law as to appeals is contained in The Code, sec. 558: "Whenever an appeal is perfected as provided by this Code, it stays all further proceedings in the Court below upon *the judgment appealed from*, or upon the matter embraced therein; but the Court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. And the Court below may, in its discretion, dispense with or limit the security required, when the appellant is an executor, administrator, trustee or other person acting in another's right; and may also limit such security to an amount not more than fifty thousand dollars, where it would otherwise exceed that sum."

R. O. BURTON,
For the Motion.

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH.

PLAINTIFF'S BRIEF

made, but to find the janitor and get from him a key. Later the said Jones returned with Mr. Day, one of the attorneys for Messrs. Caldwell and Pearson, and also with the janitor, who said he did not have a key. This affiant repeated his advice and suggested getting a key from Mr. Brockwell, a locksmith. Something was said about the possibility of the granting of a *supersedeas*, and therefore the need of haste. Affiant told the Sheriff that he need not assume that a *supersedeas* would be granted, but if notice of *supersedeas* should be given him, to proceed no further till morning, as affiant would want to look into the matter before advising him; that he had till the meeting of the Court in February to execute the writ and make his return.

T. M. ARGO.

Sworn to and subscribed before me this 13th day January, 1898.

H. H. ROBERTS,
Notary Public.

AFFIDAVIT OF HAM T. JONES.

HAM T. JONES, being duly sworn, says that he is the Sheriff of Wake County, North Carolina; that the execution or writ of possession in these cases was delivered to him by W. H. Day, Esq., about 6:30 o'clock, p. m., on the 23d of December, 1897, and he went with Day to the porch of the State building which contains the Commission rooms, the State Museum, the Agricultural Department and the Experiment Station. Finding the doors locked, the affiant declined to break open the same, but said he would go and find the janitor. Not finding him, he went to consult with Col. T. M. Argo, one of the leading lawyers of the Raleigh bar, and he advised him not to break open said doors, as no one was in and no demand had been made. Later, about 9:30 o'clock, p. m., Mr. Day went with him to see Col. Argo, and also the janitor, who stated that he did

not have the key. Colonel Argo repeated his advice, and in reply to some suggestion as to the issuing of a *supersedeas*, said Argo stated that it was not incumbent on the affiant to anticipate a *supersedeas*, but to discharge his duty as he would in any other case; that as no one was in the Commission rooms no demand to open the doors had been made, and until such demand was made, affiant had no right to break open the doors. He also suggested getting a key from Brockwell. Affiant has never executed the writ of possession. At some time during the night of December 23d, 1897, Messrs. Caldwell and Pearson got into said rooms themselves, and have since been in possession thereof, with the books, papers, etc., pertaining to said office.

J. W. Wilson and S. Otho Wilson were not in the city on said night. Affiant had heard directly from Judge Whitaker, before he went to consult T. M. Argo the last time, that a writ of error had been allowed by the Chief Justice, but no formal notice had been served on him.

HAM T. JONES.

Sworn to and subscribed before me this 13th day of January, 1898.

H. H. ROBERTS,
Notary Public.

AFFIDAVIT OF T. F. BROCKWELL.

T. F. BROCKWELL, being duly sworn, says that he is a locksmith in the city of Raleigh, N. C. On the night of December 23d, 1897, he received a message to come to the Executive Mansion and bring tools to pick a lock. Affiant went up and saw the Governor of the State, who told him to go with Messrs. L. C. Caldwell and John H. Pearson, who were present, and pick the locks of the Railroad Commission rooms and open the doors. Affiant went with said Pearson and Caldwell from the Executive Mansion, picked said locks about 11:30 o'clock P. M. on said night, and the

said Caldwell and Pearson immediately entered and took possession, and by their instructions affiant at once put new locks on the doors. Affiant know nothing of the writ of error or of its effect.

T. F. BROCKWELL.

Sworn to and subscribed before me this 11th day of January, 1898.

H. H. ROBERTS,
Notary Public

AFFIDAVIT OF SPIER WHITAKER.

SPIER WHITAKER, being duly sworn, says that he was one of the counsel for the plaintiffs in error, and was present when the writ of error in these cases was allowed by the Chief Justice of the State Court and when the bond was accepted and the citation signed by him. He was also present when the said papers were filed in the office of the Clerk of the Supreme Court and the copies lodged for the defendants in error at 7:10 P. M. on said 23d day of December, 1897. As soon as this was done affiant started to the house of Mr. Day, one of the counsel of the defendants in error, but saw him in the Capitol Square, about fifty yards from the Commission rooms. Affiant told him the writ of error had been allowed and the *supersedeas* granted. This was a very short while after seven o'clock P. M. Soon thereafter affiant went to the office of the Sheriff and notified him that the *supersedeas* had been granted, and notified him also that he would be guilty of contempt of the Supreme Court of the United States if he proceeded further with said writ. James W. Wilson and S. Otho Wilson were absent from the city and had been for several days.

SPIER WHITAKER.

Sworn to and subscribed before me this 11th day of January, 1898.

H. H. ROBERTS,
Notary Public

No. 558.

Answer of L. C.

FILED.
JAN 17 1898
JAMES H. McKENNEY.
CLERK

No. 558.

UNITED STATES OF AMERICA,

IN THE SUPREME COURT.

JAMES W. WILSON, PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA, ON THE RELATION OF L. C. CALDWELL, DEFENDANT IN ERROR.

To the Honorable the Supreme Court of the United States of America:

The answer of L. C. Caldwell, respondent, to the petition of the plaintiff in error, respectfully showeth:

1. That on the 23d day of September, 1897, the Governor of North Carolina, in pursuance of the power and authority confided in him, and the duties imposed upon him by the public laws of North Carolina, section 1, chapter 320 of the Acts of the General Assembly, at the session of 1891, and after due notice to the plaintiff in error, and due enquiry in the premises, suspended the said James W. Wilson from his office of Railroad Commissioner, and appointed the said relator, L. C. Caldwell, to fill the vacancy created by said suspension.

That the said relator thereupon on the 24th day of September, 1897, was duly qualified by taking the oaths prescribed by law, and made due demand upon the plaintiff in

error for the possession of said office, and upon the refusal of the said plaintiff in error to comply with said reasonable demand the defendant in error herein brought an action in the nature of *quo warranto* in the Superior Court of Iredell County, in said State, a court of competent jurisdiction, to oust the said plaintiff in error from the said office, and to induct the said relator therein, and for other relief.

That upon the trial in said Superior Court the presiding Judge thereof declined to submit any issues of fact to a jury, and rendered judgment in favor of the plaintiff and the relator in said action, and that the defendant appealed from said judgment to the Supreme Court of said State.

This respondent admits, as he is informed and believes, that a *supersedeas* bond was filed in the said Superior Court, but this respondent says that upon the hearing of said appeal being advanced in the Supreme Court of North Carolina the said respondent took no steps to get possession of the said office until the determination of the case in the said court; and the plaintiff in error continued to discharge its duties.

2. That the judgment in said appeal was rendered in said Supreme Court of North Carolina about 4:30 o'clock P. M. on the 23d day of December, 1897, and a writ was issued out of said court at 5:30 P. M. of said day, as set out in the third article of the affidavit of the plaintiff in error.

This respondent further says that the said writ was immediately placed in the hands of the Sheriff of Iredell County by the Clerk of the said Supreme Court, and that said Sheriff, as this defendant is informed and believes, went to the offices of the Railroad Commission for the purpose of executing said writ, but that the said plaintiff in error was not to be found, and, as this respondent is informed and believes, was absent from the said county and State for the purpose of avoiding service of the same; that the doors of the said room were locked and no person was

left in charge thereof, and the persons having keys to said offices were purposely out of the city, and respondent is informed and believes and avers, for the purpose of preventing and hindering the execution of the said writ. That, as respondent is informed and believes, the said Sheriff left the said rooms with the avowed purpose of geting the keys or other means of entry therein, and did not return. And that this respondent, with John H. Pearson, who was in like case with himself, after waiting a reasonable time for the return of the said Sheriff, and being advised by counsel that he had good right in law so to do, procured the doors of said room to be opened, and entered therein and assumed to exercise the duties of the office of Railroad Commissioner.

Respondent found upon taking charge of said office that the seal of said Commission had been taken away, as he is informed and believes, by the late Chairman of said Commission, and caused to be deposited in one of the banks of Raleigh.

And affiant is advised, informed and believes that, having been accompanied by the Sheriff with said process in his hands, into the front porch of said Commission rooms, he was in contemplation of law placed in possession of the whole, and that he had the right to open the doors and remove any obstruction to the full possession and occupation of said Railroad Commission rooms and every part of the same.

3. That this respondent believes that a writ of error was sued out by the counsel of the plaintiff in error, and was allowed by the Chief Justice of the Supreme Court of North Carolina, as alleged in the fourth article of the petition, and that a paper purporting to be a bond, conditioned as required by law in cases of *supersedeas*, was tendered by said counsel and approved by said Chief Justice on the 23d day of December, 1897, and that the said writ of

error, with the petition therefor, and the assignment of error and the citation and bond were filed in the Clerk's office as alleged in said article of the petition. But this respondent denies that any notice of the filing of said bond was served upon him, or that he had any knowledge of the filing of said bond until the day after the occurrence herein set out, and he avers that the citation was not served upon him until the 25th day of December, 1897, at 3 o'clock P. M. And this respondent is advised and believes that the said bond, even if sufficient in law as a *supersedeas* bond, will not have any other effect in law than to stay proceedings for the enforcement of the judgment for costs in said action, and does not defer the relator's right to take possession of said office and hold the same.

This respondent has no knowledge nor information as to the allegations of said petition that his counsel, W. H. Day, Esq., went to the Clerk's office and examined said bond. And this respondent avers that neither said counsel nor any other person informed respondent of the filing of said bond.

That affiant did not communicate with or receive any advice or counsel from W. H. Day after the Sheriff of Wake County left the building in which the Railroad Commission offices are located, which was long prior to filing the *supersedeas* bond in the office of the Clerk of the Supreme Court of North Carolina.

This respondent denies that the Governor of North Carolina either before or after the copy of the writ of error was handed to him, if it was so handed, of which this respondent has no knowledge, sent for a locksmith and sent him with said Caldwell and Pearson with instructions to pick said locks and open the doors. But respondent avers that respondent with said Pearson, on advice of counsel, believed then, and still believing that they had the right so

to do, procured the doors to be opened by a locksmith, without unnecessary force or violence, and entered and took possession of said offices.

This respondent denies that he well knew of the action of the Chief Justice in the premises. He admits that he had a conference with the Governor, and had from him information that the Chief Justice of North Carolina either had allowed or probably would allow the writ or error; but this respondent had no knowledge of any kind of the filing of any bond purporting to be a *supersedeas* bond or one the effect of which would be to effect a stay of proceedings in said action, until he saw an article in the newspapers of Raleigh on the morning after he had so gone into possession of said office.

4. That it is true, as alleged in the fifth article of the petition, that on the morning of the 24th of December, 1897, W. H. Day, Esq., as counsel for the relator, made a motion in the Supreme Court to set aside said *supersedeas*, and at the same time the petitioner's counsel made a motion that said execution, or writ of possession, be recalled on account of the *supersedeas*, and that both motions were refused.

This respondent says that the opinion delivered by said Court upon said motions is filed herewith. He admits that since that time he, with said Pearson, has begun to discharge the duties of the said office of Railroad Commissioner, and the Commission has held a regular meeting for the transaction of business. And this respondent, as he is advised and believes, avers that the plaintiff in error has no rights in the premises. That this defendant relies upon the law as applied to the facts set out in the transcript and record filed by petitioner, and respectfully submits to this honorable Court that he has acted strictly within the rights and duties imposed upon him by law and under advice of counsel learned in the law.

And he expressly disclaims and denies that any act of his in the premises was done in contempt of this honorable Court.

And having thus fully answered, your respondent prays to be hence dismissed with his costs, and your respondent will ever pray, etc.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF NORTH CAROLINA.

L. C. Caldwell, being duly sworn, deposes and says that the foregoing answer is true of his own knowledge, except as to allegations therein made on information and belief, and as to those matters he believes it to be true.

Sworn and subscribed before me this ---- day of January, 1898.

No. 305.

NORTH CAROLINA SUPREME COURT,

SEPTEMBER TERM, 1897.

L. C. CALDWELL
vs.
J. W. WILSON.
From Iredell.

Clark, J. This is a motion by defendant to recall the execution which issued to put the relator in possession of the furniture, rooms and other tangible property belonging to the Railroad Commission. The relator moved to set aside the *supersedeas* proceedings or adjudge them irregular. We are of opinion that we have no power to set aside the writ of error or pass the regularity thereof. We are also of opinion that the judgment of this Court *ex proprio vigore* placed the relator in possession of the office at the time the judgment was filed. He having already qualified, no pro-

cess was necessary for that purpose. He is in full possession of the same and in full power to exercise its duties, and draw the salary thereto attached, from the date of his appointment. The judgment took effect immediately upon being filed, and is not superseded by the subsequent writ of error, regular or irregular. *Foster* v. *Kansas*, 112 U. S., 201. The relator being in office by virtue of the judgment of this Court, any attempt by the defendant to exercise its functions, or to interfere with the full and free exercise thereof by the relator, and any attempt by any one else to interfere by alleged legal process or otherwise, unless and until the Supreme Court of the United States shall reverse the judgment of this Court, will be a contempt of this Court. We decline to make any order recalling the execution. Both motions refused.

No. .....

UNITED STATES OF AMERICA,

IN THE SUPREME COURT.

OCTOBER TERM, 1897.

JAMES W. WILSON, *Plaintiff in Error*,

versus

THE STATE OF NORTH CAROLINA, ON THE RELATION OF L. C. CALDWELL, *Defendant in Error.*

W. H. Day, being duly sworn, says he is of counsel for the defendant in error in the above entitled cause. That on the evening of the 22d of December, 1897, he was present when the Sheriff of Wake County went with the defendant Caldwell and J. H. Pearson to the offices of the Railroad Commission. That said Sheriff went to the doors of the Commission rooms, fronting on the porch on Edenton Street. That said doors were locked. The Sheriff and said Caldwell and Pearson then passed through the hall, between the Railroad Commission rooms and the Agricultural rooms, to the rear door of said Commission offices on the hall. That this door was also locked. The Sheriff was requested by this affiant to force said door and put the defendant in error in possession of said offices.

The Sheriff replied, he did not want to force the door, but would go for the janitor of the building and get the key, return, and put them in possession. That if the janitor

did not have the key, he would return and force the door, and put them in possession. That the Sheriff then left and did not return. That this affiant then advised the defendant that he had the right to force said doors, and enter and take possession of the Railroad Commission offices. That this was long prior to the filing of the writ of error and *supersedeas* bond in the office of the Clerk of the Supreme Court of North Carolina. That this affiant then left, and did not see or communicate with the defendant in error till the succeeding day. That this affiant went to the office of the Clerk of the Supreme Court, and saw the writ of error and *supersedeas* bond, about two hours after he left the Railroad Commission office, but he did not see defendant in error or communicate with them after he saw said writ of error and *supersedeas* bond, till the next day. W. H. Day.

Sworn and subscribed before me, this 11th day of January, 1898. N. J. Riddick,
Clerk U. S. Circuit Court, Eastern District N. C.

NORTH CAROLINA—Wake County.

H. C. Brown, being duly sworn, says: That he is now Clerk to the Board of Railroad Commission in and for the State of North Carolina, and has been since its organization, under the Act of the General Assembly of 1891. That said Railroad Commission has a seal; that the same was taken from the office of said Railroad Commission between the first and fifteenth day of December, 1897, by James W. Wilson, one of the former Commissioners, and Chairman of said Commission; and the said seal was kept out of said office until the 25th day of December, 1897, when said Wilson notified affiant that said seal of office was at the Citizens Bank, subject to his order. H. C. Brown.

Sworn to and subscribed before me, this January 13th, 1898. A. B. Andrews,
Notary Public, Wake County, N. C.

No. .....

UNITED STATES OF AMERICA,

IN THE SUPREME COURT.

JAMES W. WILSON, *Plaintiff in Error*,

versus

THE STATE OF NORTH CAROLINA On the Relation of L. C. CALDWELL, *Defendant in Error.*

Respondent's Brief on the Motion to Attach for Contempt.

The respondent respectfully submits that he has not been guilty of contempt of this Honorable Court—

I. Because the judgment of the Supreme Court of North Carolina was in itself self-executing, and needed no writ to enforce it.

The Code of North Carolina, sec. 611, is as follows: "If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he shall be entitled, after taking the oath of office and executing such official bond as may be required by law, *to take upon himself the execution of the office;* and it shall be his duty, immediately thereafter, to demand of the defendant in the action all the books and papers in his custody or within his power belonging to the office from which he shall have been excluded."

The judgment of the Superior Court, affirmed by and made the final judgment of the Supreme Court of North Carolina, operated of itself to suspend the plaintiff in error from the office of Railroad Commissioner. There was no vacancy, because it had already been filled by appointment of the Governor under the law—Acts of 1891, ch. 320, sec. 1.

Respondent had already qualified by taking the oath of office immediately upon his appointment, and no bond was required of him.

There was no undue haste, either on the part of the respondent or of the Courts; the policy of the law requires the trial of such cases to be expedited. Code of North Carolina, sec. 616.

In pursuance of this policy, on application of counsel for relator, in open Court, no objection being made thereto (see opinion of Mr. Justice Clark attached to respondent's answer), the Supreme Court rendered final judgment and directed process to issue under section 957 of The Code of North Carolina.

The respondent being already in office by virtue of his appointment and of the judgment, it required no writ to put him in. But the Sheriff, in obedience to the writ, went with respondent upon the porch of the building and to the door of the Commission rooms, and, finding it closed, left him there.

The suspended officers were absent, as respondent swears, to avoid service of the writ; the clerk and janitor were gone, the seal removed, the doors locked.

The respondent had been by the final judgment declared the rightful incumbent, and by the statute directed to take possession.

We submit that, being in the building, if he had had the key, he might have unlocked the door and gone in; he was to all intents and purposes in possession, and the Sheriff's duty was performed immediately after 5.30 p. m., there being no physical opposition to the entry of respondent, requiring the power of the county to overcome it.

This was more than an hour before the filing of the writ of error and bond in the office of the Clerk of the Supreme Court—at 7.10 o'clock on the same day—and it made no difference that respondent did not procure the doors to be opened for some hous later.

Herman on Executions, § 529.
Freeman on Executions, §§ 473, 474.

Relator should be left in quiet possession; here there was no one to remove from the office or rooms. What was more appropriate to be done than for the relator to have quietly sent for a locksmith and had the door opened.

"Where, upon *quo warranto*, there is a judgment that the relator is entitled to the office, and that defendant be ousted and pay costs, and he appeals to the Supreme Court and files a *supersedeas* bond in the form provided by law: Held that from such judgment an appeal will lie, and that the *supersedeas* bond will stay proceedings for the enforcement of the judgment for costs, but doe not defer the relator's right to take possession of the office under chapter 6, section 20 of The Code, no process being required to execute the judgment in that respect.

Fawcett *v.* Superior Court, 15 Washington Rep., 342.
S. C. 55 Am. St. Rep., 894.
Joyse *v.* Drorburgh, 63 Iowa, 711.

"Upon a judgment of amotion from office, the party amoved is divested of all official authority and excluded from office so long as the judgment remains in force." (High on Ex. Rem., § 756). And when judgment is rendered in favor of a relator, he needs no writ to invest him with the office. Under section 8639, How. Stat., he is entitled to take upon himself the execution of the office. Can this right be defeated or suspended by suing out a writ of error and giving a bond to stay execution? The statute (secs. 8697,

8681) provides for a stay of execution by suing out a writ of error, but does not authorize a suspension of a judgment which requires no aid from process to give it effect. The practical result of permitting such a writ to suspend the judgment in *quo warranto* cases *would in many cases be to defeat the relator of his remedy wholly.* Such a construction is not to be indulged, except it be imperatively required by the terms, which we think is not the case here."

People *ex rel.* Wagenseil *v.* Stephenson, 98 Mich., 218.

"Upon the rendition of a regular judgment of ouster in the suit of the people against a public officer, and in favor of another individual for the office, the officer becomes actually ousted and excluded from office, and the party declared to be entitled, upon taking the official oath and filing his bond (when required), becomes, *eo instanti*, invested with the office and entitled under section 437 of The Code to demand and have the books and papers appertaining to the office."

Welsh *v.* Cook, 7 How. Pr. Rep., 282, especially pages 285–6.

Section 437 of the New York Code is substantially the same as section 611 of the North Carolina Code.

"A judgment suspending an attorney from practice executes itself, except as to the collection of costs, and is not affected by an appeal therefrom to the Supreme Court and obtaining a *supersedeas.*"

Walls *v.* Palmer, 64 Ind., 493.

"Under a statutory provision that 'if judgment be rendered in favor of such claimant he shall proceed to exercise the functions of the office after he has qualified as required by law,' a *supersedeas* bond filed on appeal to the Supreme Court from a judgment in favor of the claimant stays proceedings for the enforcement for costs, but does not defer

the relator's right to take possession of the office, no process being required to execute the judgment in that respect."

Payne on Elections, 852.
Mechem on Pub. Office, sec. 497.

"The judgment requires no aid from process to give it effect. 98 Mich., *supra*. His appeal, in the absence of an express provision of the law to the contrary, did not, and could not, in the very nature of things, affect the judgment; the judgment was not annulled thereby, but it remained in full force and effect. Such seems to be the uniform rulings of all Courts on this question. The authorities cited above seem to be conclusive on these points, and a number of them expressly hold that a *supersedeas* does not lie in a contested election case, and there is not a single authority to the contrary, so far as we can ascertain."

State *ex rel.* Craig *v.* Woodson, 128 Mo., at p. 506.

"Sec. 1007 of the Rev. Stat., which, as amended by the Act of February 18, 1875 (18 Stat., part 3, p. 316), provides that where a writ of error may operate as a *supersedeas*, execution shall not issue until the expiration of ten days after the rendition of the judgment, has reference only to the judgments of the courts of the United States."

Doyle *v.* Wisconsin, 94 U. S., 50.

II. But if it had been necessary that the Sheriff should have gone further in execution of the writ by opening the door, and if the bond filed did not have the effect of a *supersedeas* as contended by the plaintiff in error, we respectfully submit that there can be no contempt without the intent to commit it—in this case to disobey an order of this Court. And respondent swears he did not know of the filing of the bond in the Clerk's office at the time he took possession of the rooms and assumed the office, and not until the next day. And further, that he acted under advice of counsel.

The better, but, as we shall see, not the unanimous opinion, is that on a rule to show cause why a party should not be punished for contempt, the actual intention of the party is material, and if the respondent disavows, upon oath, any intention of committing a contempt, the rule will be discharged.

Rapalge on Contempt, § 121.
In re Moore, 63 N. C., 397.
Re Walker, 82 N. C., 95.
Bond *v.* Bond, 69 N. C., 97.

JAS. C. MACRAE,
W. H. DAY,
A. C. AVERY,
Attorneys for Respondent.

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH.

No. 559.

FILED
JAN 8 1893
JAMES H. McKENNEY,
CLERK

UNITED STATES OF AMERICA,

IN THE SUPREME COURT.

S. OTHO WILSON, PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA, BY Z. V. WALSER, ATTORNEY-GENERAL, ON THE RELATION OF JOHN H. PEARSON, DEFENDANT IN ERROR.

To the Honorable the Supreme Court of the United States:

The petition of S. Otho Wilson, plaintiff in error in this cause, respectfully showeth—

1. That there is involved in this action a contest over the office of Railroad Commissioner for the State of North Carolina.

2. That the Governor of North Carolina undertook to suspend your petitioner from his said office and fill his place with the relator, John H. Pearson; that upon your petitioner's refusal to surrender his office upon the action of the Governor—which he considered and still considers illegal—the present action, in the nature of *quo warranto*, was brought. That upon the trial in the Superior Court of Wake County the issues tendered by your petitioner were excluded, and the Court gave judgment for the plaintiff. Thereupon your petitioner appealed, and a *supersedeas* bond was filed and accepted, and your petitioner continued to discharge the duties of his office.

3. That judgment in the Supreme Court of North Carolina was rendered about 4.30 o'clock p. m. on the 23d day of December, 1897; that a writ of possession was issued to the Sheriff of Wake County at 5.30 o'clock on said day, commanding the said Sheriff to eject your petitioner from the rooms of the Railroad Commission and to put the relator in possession thereof and of the books and papers of said office, and to make return to the February Term, 1898, of said Court; that said writ of possession has never been executed.

4. That the counsel of your petitioner sued out a writ of error, returnable to this Court, which was issued by the Clerk of the United States Circuit Court for the Eastern District of North Carolina, and was duly allowed by the Chief Justice of the Supreme Court of North Carolina on the said 23d day of December, 1897. The said counsel duly tendered a good and sufficient bond, conditioned as required by law in cases of *supersedeas*, and the Chief Justice of the said State Supreme Court duly approved the same and signed the citation on said 23d day of December, 1897. Thereupon, at 7.10 o'clock p. m. on said day, the said writ of error, with the petition therefor, and the assignment of errors and the said citation and bond, were filed in the Clerk's office of the said Supreme Court, and at the same time copies of said writ of error were lodged in said Clerk's office for the State of North Carolina and for the relator, Pearson, and for Z. V. Walser, Attorney-General. A few minutes thereafter one of your petitioner's counsel saw W. H. Day, Esq., acting as counsel for the relator, and told him that the *supersedeas* had been granted. Whereupon the said Day went into the said Clerk's office and asked to see the bond, which was at once handed to him, and he examined the same. The Railroad Commission rooms and the Supreme Court Clerk's office are in adjoining buildings, about ten or twenty feet apart, and the Clerk of the Supreme Court lives about two hundred yards off.

On information and belief, the Clerk of the Supreme Court, in a few minutes after the lodging of said copies of the writ of error, sent by his deputy the copy lodged for the State of North Carolina to Daniel L. Russell, Governor of said State, and it was promptly delivered to him. The said deputy was unable to find the said Pearson and Caldwell, the latter being engaged in a similar contest with Jas. W. Wilson, but showed the copies for them to W. H. Day., Esq., their counsel, and he read the same several hours prior to the forcible entrance into said rooms, hereinafter set forth.

Further, on information and belief, your petitioner says that the said Governor, after the copy of the writ of error was handed him and with full knowledge of the *supersedeas*, sent for a locksmith and sent him with the said Caldwell and Pearson, with instructions to pick the locks on the doors of said Commission rooms, and open the doors. Said locksmith did so, and said Pearson and Caldwell at once entered and took possession about 11.30 o'clock p. m., on said 23d December, 1897, and had new locks put on and have since remained in possession.

On information and belief, the said Pearson and Caldwell well knew of the action of the Chief Justice in the premises, and took possession as aforesaid after conference with the Governor. The home of their counsel, Mr. Day, is in about fifty yards of the said Commission rooms.

5. That on the morning of the 24th December, 1897, the said W. H. Day, Esq., as counsel for the relator, made a motion in open Court to set aside said *supersedeas;* and at the same time your petitioner made a motion that said execution or writ of possession be recalled on account of the *supersedeas*. Both motions were refused, and the Justice delivering the opinion warned all persons against interfering with the said Pearson and Caldwell and announced that they would be in contempt of the Supreme Court of the State if they molested or disturbed them in the office or the

discharge of the duties of the same. Since said time the said Pearson and Caldwell have begun to discharge the duties of the office, and have held a regular meeting for the transaction of businesss, and your petitioner is unable to assert his rights on account of the threat against him in the said opinion filed and which is here referred to for greater certainty.

6. Your petitioner has filed a full and complete transcript of the record of said case, and he prays that the same be referred to for a fuller statement of the facts of the controversy and the said proceedings.

Wherefore your petitioner prays that the said Pearson may be compelled to desist from the discharge of the duties of said office, and that the said rooms and books and papers of the office be restored to your petitioner; that the said Pearson be adjudged to be in contempt of this honorable Court, and that your petitioner be restored to his position; and for such other and further relief as may be just. And your petitioner will ever pray.

R. O. Burton,
Attorney for Petitioner.

United States of America,
Eastern District of North Carolina.

S. Otho Wilson, being duly sworn, says the foregoing petition is true, of his own knowledge, except as to allegations therein made on information and belief. As to those matters, he believes it to be true.

S. Otho Wilson.

Sworn to and subscribed before me, this 3d day of January, 1898.

[L. S.] N. J. Riddick,
Clerk U. S. Circuit Court Eastern District N. C.

IN THE SUPREME COURT OF THE UNITED STATES.

S. Otho Wilson, *Plaintiff in Error*,
versus
The State of North Carolina, by Z. V. Walser, on the relation of John H. Pearson, *Defendant in Error.* } *Notice.*

To Messrs. A. C. Avery and MacRae & Day, Attorneys for Defendant in Error, and John H. Pearson:

Take notice, that on the foregoing petition and affidavit I shall move before the Honorable, the Supreme Court of the United States, on Monday, January 17, 1898, or as soon thereafter as counsel can be heard—

1. That the relator, John H. Pearson, be attached for contempt, on account of his conduct in disregard of the *supersedeas* granted in this cause.

2. That he be commanded to desist from acting as Railroad Commissioner till the decision of this controversy; and in the meantime that he restore the plaintiff to the office and turn over to him the rooms of said Railroad Commission, with all the books, papers and property pertaining to said office.

3. That a writ of restitution be granted to restore said plaintiff in error to said office.

4. That a writ issue to the Sheriff of Wake County, commanding him to proceed no further with the writ of possession in his hands.

5. For such other and further relief as the nature of the case may require.

This January 6, 1898.

R. O. Burton,
Attorney for Plaintiff in Error.

No. 558.

Brief of Hill for P. E. 10 mo.

FILED.
FEB 14 1898
JAMES H. McKENNEY,
CLERK

No. 558.

SUPREME COURT OF THE UNITED STATES,

Filed Feb. 14, 1898.

OCTOBER TERM, 1897.

JAMES W. WILSON, PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA ON THE RELATION OF L. C. CALDWELL, DEFENDANT IN ERROR.

Brief of Thomas N. Hill, of Counsel for Plaintiff in Error.

At the time when the defendant in error took forcible possession, the Supreme Court of the United States had acquired control.

Revised Statutes U. S., secs. 997, 998, 999, 1000, 1004, 1007.

There was strict compliance with these provisions. The writ of error and citation were issued and bond approved at the same time, and service of the writ was made on the day on which it was issued, December 23, 1897.

The *supersedeas* was perfected when the citation was signed, "as the security provided by law was given in its issuing." Sec. 1007. It was not necessary that the citation should be served. Ibid.

In Draper v. Davis, 102 U. S., 370, Chief Justice Waite, delivering the opinion of the Court, says:

"When the original bond of $1,000 was accepted by the Justice, and the citation signed, an appeal was allowed and security taken, which operated as a supersedeas. That transferred, the jurisdiction of the suit appealed to this Court. * * * The power of the Justice over the appeal and the security in the absence of fraud, was exhausted when he took the security and signed the citation. From that time the control of the *supersedeas*, as well as of the appeal, was transferred to this Court."

"A *supersedeas* is not obtained by virtue of any process issued by this Court, but it follows as a matter of law from a compliance by the appellant with the provisions of the act of Congress in that behalf."

Goddard v. Ordway, 94 U. S., 672.
Jerome v. McCarter, 21 Wall., 17.
United States v. Addison, 22 How., 174.

(This was a case in which a public officer sued out a writ of error and gave supersedeas bond.)

French v. Shoemaker, 12 Wall., 86.
O'Dowd v. Russell, 14 Wall., 402.
Commissioners v. Gorman, 19 Wall., 661.
Tel. v. Eyser, 19 Wall., 419.
Kitchin v. Randolph, 93 U. S., 86.
Mendenhall v. Hall, 134 U. S., 559.
Covington v. Keith, 121 U. S., 248.
Goodwin v. Fox, 120 U. S., 775.
Town of Danville v. Brown, 128 U. S., 523.

Citation not jurisdictional.

Evans v. Bank, 134 U. S., 330.
Richardson v. Green, 130 U. S., 104.
Hewitt v. Filbert, 116 U. S., 142.

The writ brings up the record and the citation the parties.

Kitchin v. Randolph, supra.

It would seem that the provision for delay of execution in section 1007 Rev. Stat, is broad enough to embrace judgments and decrees in State Courts, as well as in Courts of the United States, but there seems to be a conflict in the decisions in regard to this. It is, however, not a question of importance in this case, inasmuch as the writ of possession has never been executed.

In United States v. Addison, 22 How., 174, it was held that judgments of ouster in *quo warranto* is superceded by writ of error, bond, etc.

Judgment of ouster in State Court was suspended by appeal without *supersedeas* bond.

Hannon v. Commissioners, 89 N. C. R., 123.

Supersedeas bond provided for Acts North Carolina, 1885, Chap. 406, Sec. 2.

On the 24th December, 1897, the Supreme Court of North Carolina handed down an opinion, in which they say: "We are also of the opinion that the judgment of this Court, *ex propria vigore*, placed the relator in possession of the office at the time the judgment was filed. He having qualified, no process was necessary for that purpose. He is in full possession of the same, and entitled to exercise its duties and draw the salary thereto attached from the date of his appointment. The judgment took effect immediately upon being filed, and is not suspended by the subsequent writ of error, regular or irregular.

Foster v. Kansas, 112 U. S., 201.

This opinion was extra-judicial, for the reason that

when it was rendered the case was not within the jurisdiction of the Supreme Court of the State. The *supersedeas* was taken in accordance with the Acts of Congress, which are part of the supreme law of the land, and the Judges in every State are bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

Constitution U. S., Art. 6, Sec. 2.

Whether the proceedings in error became operative as a *supersedeas* or not is a question solely for the consideration of the Supreme Court of the United States.

Ex-Parte, Chetwood, 165 U. S., 443.
Slaughter House cases, 10 Wall., 273.

In Foster v. Kansas, the person sought to be attached had entered upon the discharge of the duties of the office one day before the writ of error was filed in the Clerk's office. It was held therein that the judgment created a vacancy, but it was not held that the judgment put him into possession.

The Code of North Carolina lays down the rules in *quo warranto* to recover an office, in secs. 610, 611, 612.

"Sec. 610. In every such case judgment shall be rendered. * * * upon the right of the party so alleged to be entitled. * * *

Sec. 611. If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he shall be entitled to take upon himself the execution of the office."

There is nothing in the Act which professes to put him in actual possession. He has a right of possession. This position is strengthened by Sec. 1, Chap. 406, Acts N. C., 1885, which provides that when such judgment is recovered, "It shall be the duty of the Court to issue

a writ of mandamus, or other process in such action which may be necessary to carry such judgment into effect and to induct the party so entitled into said office."

The judgment of the Supreme Court of North Carolina (printed record, pages 41 and 42), conforms to said Acts.

The defendant in error is in contempt of this Court. His forcible entrance was disobedience or resistance to the writ.

Rev. Stat. U. S., Sec. 725.
Natal v. Louisiana, 123 U. S., 516.

In re Chiles, 22 Wall., 157, the Court says: "The exercise of this power (to punish for contempt) has a twofold aspect—first the proper punishment of the guilty party for his disrespect to the Court or its order, and the second to compel his performance of same act or duty required of him by the Court, which he refuses to perform."

In this case Chiles disobeyed an order for injunction. It is cited with approval in Eureka Lake Co. v. Yuba County, 116 U. S., 410.

In re Swan, 150 U. S., 637, the seizure by a constable of property in the hands of a receiver of a railroad company, appointed by Circuit Court United States, was held to be contempt, notwithstanding the constable's disclaimer of any purpose to commit contempt, and justified under the Dispensary law of South Carolina.

Ex-Parte Tyler, 148 U. S., 164.
In re Debs, 158 U. S., 568.

Debs and his confederates were adjudged in contempt for disobedience of an injunction order. The conduct of defendant in error was as much an infraction of the law as that of Debs and his associates. It prevented Wilson

from continuing to occupy the office and discharging the duties of Commissioner, which he was entitled to do as soon as the *supersedeas* was perfected.

Disavowal of intent to commit contempt purges only in cases "where the intention to injure constitutes the gravomen," such as libelous publications, etc.

In re Moore, 63 N. C., 408.

This Court can compel the defendant in error to make reparation.

Section 716, Rev. Stat., confers upon this Court full power to issue such writs as may be "necessary for the exercise of its jurisdiction."

It is not limited to a choice of means.

McCullough v. Maryland, 4 Wheat., 429.

The form of the writ must depend upon the circumstances of the case.

Goddard v. Ordway, 94 U. S., 672.
United States v. Child, 9 Wall., 661.
Knox v. Aspinwall, 24 How., 376.
In re Chitwood, 165 U. S., 443.
Am. Con. Co. v. Jacksonville, 148 U. S., 372.
Hardiman v. Hardiman, 4 How., 682.

A writ of restitution should be granted.

Commissioners v. Gorman, 19 Wall., 661.
Ex-Parte Milwaukee, 5 Wall., 188.

THOMAS N. HILL,
Of Counsel for Plaintiff in Error.

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH.

No. 559.

Brief of Burton for P. C.

FILED.
FEB 15 1898
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

Filed Feb. 15, 1898.

FEBRUARY TERM, 1898.

S. OTHO WILSON, PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA, BY Z. V. WALSER, ATTORNEY GENERAL, ON THE RELATION OF JOHN H. PEARSON, DEFENDANT IN ERROR.

Separate Brief for S. Otho Wilson.

STATEMENT OF FACTS.

This is an action in the nature of *quo warranto* to oust the plaintiff in error from his office of Railroad Commissioner of the State of North Carolina. His term of six years began April 1st, 1896. On the 24th August, 1897, the Governor sent to the plaintiff in error the following letter:

RALEIGH, August 24, 1897.

To S. OTHO WILSON, ESQ.,
Member of the Railroad Commission of North Carolina.

SIR: By section first of the Railroad Commission Act, ratified the fifth day of March, 1891, it is made the duty of the Governor to suspend from the office any Railroad Commissioner who shall be holder of "any stock or bond of any railroad company; or be the agent or employee of any such company; or have any interest *in any way* in such company;

or in case any of them shall become disqualified to act." It is alleged that a certain hotel property, known as Round Knob, is jointly owned by Major J. W. Wilson and Colonel A. B. Andrews; said Wilson being one of the Railroad Commissioners, and said Andrews being the First Vice-President of the Southern Railroad Company, and its active and general political manager for this State; that this property is of little or no value, except for the hotel, and worthless as a hotel except a railroad eating-house when so designated and patronized by the Southern Railroad Company; that this hotel has been closed for several years and has been producing no income for its owners; that you, either in your own name or that of your mother, entered into an agree ment with Messrs. Wilson and Andrews for a lease of this property for the purpose of establishing a railroad eating-house, and upon obtaining such agreement, you moved into the hotel in the month of May or June of this year and have been continuously since operating the property for your own pecuniary profit under said agreement; that previous to your rental or lease of this property the railroad company maintained an eating-house at Hickory and another at Asheville, for the accommodation of their various passenger trains going both west and east; that promptly upon your opening your hotel at Round Knob these eating-houses were discontinued, and both the western and eastern trains have been and still are stopped at your hotel for meals in pursuance of an understanding or agreement or contract between you of the one part and Messrs. Andrews and Wilson and the Southern Railroad Company of the other part.

These allegations have been made to me by many persons, and I think publication of them has been made in the public press. If they or the material substance of them be true—as to which I am expressing no opinion—then the questions to be determined are as follows:

First. Have you not become an agent or an employee of said railroad company in violation of law?

Second. Have you acquired *any interest in any way* in such company in violation of law?

Third. Have you become disqualified to act as a fair and impartial Judge or Commissioner?

Under the law the Governor not only has a right, but is required to suspend a Railroad Commissioner who commits a breach of the statute which has been cited, and this he may do, as in other cases of executive removals, without notice to the party interested; but I shall not pass judgment or decide this matter until you have a full opportunity to be heard by way of denial or explanation or justification or other defence. You will, therefore, please show cause in writing on or before Wednesday, the first day of September, 1897, at the executive office in Raleigh, why you should not be suspended from your said office and a report thereof made to the next General Assembly according to law. On the return day of this notice you will please make answer and proofs in writing and be there in person, or by counsel, at your election.

DANIEL L. RUSSELL,
Governor of North Carolina.

To which he replied:

RALEIGH, N. C., September 1, 1897.

HON. DANIEL L. RUSSELL,
Governor of North Carolina:

SIR: Replying to your notice of the 24th of August to show cause why I should not be suspended from the exercise of the duties of my office as Railroad Commissioner, I have this to say:

I have no interest in any way in the Southern Railway Company, or any other company or corporation over which the Railroad Commission has jurisdiction.

I am not in any way interested in the eating-house at Round Knob. I rented the house for my mother—the rent she pays being repairs to the house for the first year, with

an option to rent for five years at $250 per year. I have paid my board for myself and family, and have not and am not to receive one cent from the profits of the house. When at home I have rendered my mother such service as I could in managing the house, and the same services have been performed by other members of the family.

The arrangements to have the trains stopped at Round Knob for dinner was made by the railroad authorities upon their own motion, and is determinable by the Southern Railway Company at any time.

I have been owing my mother several hundred dollars borrowed money for several years, and I have purchased furniture and supplies for the Round Knob house and charged same to her in part payment of my debt.

I have no knowledge of the discontinuance of dinner-houses at Asheville and Hickory. They were not closed in consequence of an agreement with my mother to make Round Knob a dinner-house.

That a month before the notice of the Governor was received this affiant had seen Messrs. Wynne & Ellington, of this city, relative to renting a house for the purpose of bringing his family back to Raleigh. That since that time and before the notice of the Governor was received, the contract of renting was completed, and the affiant and his family are now living therein.

That affiant and family went to Round Knob for the summer because his wife had been in bad health and the family physician advised this change for the benefit of Mrs. Wilson.

Wherefore I say:

First. That I have not become agent or an employee of the Southern Railway Company.

Second. That I have not acquired any interest in any way in the Southern Railway Company.

Third. Not having any interest in any way in the Southern Railway Company, or any other company or corporation over which the Railroad Commission has jurisdiction, I have

not become disqualified to act as a fair and impartial Judge or Commissioner.

In support hereof I submit the statements of my mother, Mrs. Mary J. Wilson, Col. A. B. Andrews, Maj. J. W. Wilson, Messrs. Wynne & Ellington, and Dr. A. W. Goodwin.

And in addition to this sworn statement of facts, I respectfully refer to my record as Commissioner as proof conclusive that I am not, and have not been, influenced by any railway company, or any other company or corporation over which the Railroad Commission has jurisdiction.

I suppose that in due course of law, after reading the absolute and unqualified denials of this answer, supported and corroborated by the affidavits herewith filed, that the unsupported charges against me of a partisan press and malicious meddlers, will be immediately dismissed as without foundation and wilful and maliciously false. If I am mistaken in the view of your decision, then I demand to confront my accusers and cross-examine the witnesses against me.

Very respectfully,

S. Otho Wilson.

State of North Carolina—McDowell County.

To whom it may concern:

I see it stated that S. Otho Wilson, my son, a Railroad Commissioner for North Carolina, is charged with being an agent and employee of the Southern Railway Company, in that he is the lessee of the Round Knob Hotel on said Southern Railway.

I am a widow and have only one son. I have, while able, earned my own livelihood, and have been engaged in keeping hotels for the past thirty years, though not continuously.

I am the sole lessee of the Round Knob Hotel property, the same being rented from Maj. Jas. W. Wilson of Burke County.

My son, S. Otho Wilson, and his family have been guests of my hotel from May 1 to August 23, 1897, and have paid their board. My son has, while here, aided me in every way he could, by managing any affairs for us that he could. He has bought supplies, furniture, etc., and has paid for same out of receipts, in part, but largely with money he paid of his own, the same being a credit on notes held by me against him, which he owed me for money loaned him.

I hope he will never be so undutiful a son as not to look after the interests of a widowed mother.

(Signed) M. J. WILSON.

August 31, 1897.

A. W. Goodwin, M. D., being duly sworn, deposeth and says:

First. That his occupation is that of a practicing physician and a member of the Raleigh Academy of Medicine, residing in the city of Raleigh, N. C.

Second. That he is a regular physician in attendance upon the family of S. Otho Wilson.

Third. That the health of the wife of S. Otho Wilson has been feeble for the past twelve months.

Fourth. Owing to the condition of her health, I advised her removal to the mountains of North Carolina for the summer, which advice was followed.

Fifth. That I have been attending Mrs. Wilson recently, and that upon my advice (she intending to move to Raleigh about September 1) Mr. Wilson removed his family back there the past week.

(Signed) A. W. GOODWIN, M. D.
D. H. YOUNG, *C. S. C.*

September 1, 1897.

RALEIGH, N. C., August 31, 1897.

To whom it may concern:

On July 26, 1897, S. Otho Wilson applied to us for the rent of a house in West Raleigh, N. C., and we did not at the time have one, but he understood that we would have one soon near the college, and after several calls on us we rented him the house in West Raleigh, near the A. & M. College, which he now occupies.

Yours truly,

(Signed) WINNE, ELLINGTON & CO.,
Insurance and Real Estate Agents.

A. B. ANDREWS, being duly sworn, says:

That he is a citizen of Raleigh, N. C., and First Vice-President of the Southern Railway Company; that he owns one fourth interest in the Round Knob hotel property and the ten acres on which it is located, and that Maj. J. W. Wilson did own the other three-fourths; that the lease for the same to Mrs. M. J. Wilson, and affiant had no connection whatever with it, and did not know of it until after the contract was completed; that the arrangement for the passenger trains to stop at Round Knob was made because there was dissatisfaction with the dinner-house at Asheville, and the company was considering the propriety of building an eating-house somewhere on the line between Asheville and Old Fort. An additional reason for re-establishing the dinner-house at Round Knob (where it has been for most of the time for twelve years or more) was that, according to the schedule, it was more convenient for the passengers on both trains. The train from Salisbury arrived at Round Knob at 12:50 and the train from Asheville 12:55 P. M.; that so far as this affiant knows Mr. S. Otho Wilson has no connection with the hotel, and had nothing whatever to do with the lease of the hotel to his mother (who, as affiant knows, has long been engaged in keeping a boarding-house and hotel)

or with the arrangement by which the trains stop there for dinner; that Mr. S. Otho Wilson has no interest, legal, financial or otherwise, in the Southern Railway, or that he had any before or since he was elected one of the Railroad Commissioners, so far as the affiant has any knowledge or information, The same is true of Major Wilson.

(Signed) A. B. ANDREWS.

Sworn and subscribed to before me this 30th day of August, 1897.

(Signed) D. H. YOUNG, C. S C.

On the 23d day of September, 1897, the said Governor sent to the defendant the following communication:

RALEIGH, N. C., Sept. 23, 1897.

To S. OTHO WILSON, *Railroad Commissioner*.

SIR: Take notice that, after due investigation and consideration, I am convinced that you have violated the Railroad Commission law in some of the particulars mentioned in my letter to you August 24, 1897, and that you have not only violated said Act in the specifications set out in said Act, but that you have otherwise, within the meaning and intent and words of said Act, "become disqualified to act."

Now, therefore, in obedience to the duty imposed upon me by said Act of Assembly, I do hereby suspend you from the office of Railroad Commissioner—such suspension to continue until the quest on of your removal or restoration shall be determined "by a majority of the General Assembly, in joint session."

The fact of your suspension, together with the reasons therefor, and the evidence, documents and information connected therewith, will be reported to the next General Assembly.

You will further take notice that under and by virtue of the powers conferred and the duties imposed by the law upon the Chief Executive, I have appointed John H. Pearson,

Esq., of the county of Burke, to fill the vacancy created by your suspension.

Inasmuch as you are understood to deny the power of the Executive to suspend you from office, as provided by the statute, I have requested Mr. Pearson to make demand on you for the possession of the office, and upon your refusal, to bring action therefor, to the end that the title to the office may be judicially determined.

D. L. RUSSELL, *Governor.*

The plaintiff in error declined to surrender his office, and this action was brought October 5, 1897, to try the title thereto.

The plaintiff in error denied in his answer generally and specially the matters alleged against him, and set up the various defences set out in No. 558 (the J. W. Wilson case).

The case came on for trial in the Superior Court. At the conclusion of the reading of the pleadings, the defendant (plaintiff in error) tendered the following issues and demanded a trial by jury:

1. Did the defendant lease the Round Knob Hotel?
2. Had or has he any interest therein?
3. Has the defendant ever operated said property for his own pecuniary profit?
4. Are the trains of the Southern Railway stopped at said hotel for meals in pursuance of any understanding, agreement or contract with him?
5. Is the defendant, or was he on the first of September, 1897, an agent or employee of the Southern Railway Company, in violation of law?
6. Has the defendant acquired any interest in any way in the Southern Railway Company, in violation of law?
7. Has the defendant become disqualified to act as a fair or impartial Judge or Commissioner, or has he in any way become disqualified to act?
8. Did the defendant demand of the Governor that he be

confronted with his accusers, and that he have an opportunity to hear and cross-examine the witnesses against nim?

9. Was said denial refused?

10. Was any evidence produced?

The Court declined to submit these issues, or any issues, and the plaintiff in error excepted.

Thereupon the plaintiff below moved for judgment upon the complaint and answer. Motion allowed and the defendant (plaintiff in error) excepted. This ruling was sustained in the Supreme Court.

The other facts appear in the common brief.

R. O. BURTON,
Attorney for Plaintiff in Error.

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH.

No. 559.

Answer of O. E.

FILED.
JAN 17 1898
JAMES H. McKENNEY,
CLERK

No. 559.

UNITED STATES OF AMERICA,

IN THE SUPREME COURT.

S. OTHO WILSON, PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA, BY Z. V. WALSER, ATTORNEY-GENERAL, ON THE RELATION OF JOHN H. PEARSON, DEFENDANT IN ERROR.

To the Honorable the Supreme Court of the United States of America:

The answer of John H. Pearson, respondent, to the petition of the plaintiff in error, respectfully showeth:

1. That on the 23d day of September, 1897, the Governor of North Carolina, in pursuance of the power and authority confided in him, and the duties imposed upon him by the public laws of North Carolina, section 1, chapter 320 of the Acts of the General Assembly, at the session of 1891, and after due notice to the plaintiff in error, and due enquiry in the premises, suspended the said S. Otho Wilson from his office of Railroad Commissioner, and appointed the said relator, John H. Pearson, to fill the vacancy created by said suspension.

That the said relator thereupon on the ____ day of ____, 1897, was duly qualified by taking the oaths prescribed by law, and made due demand upon the plaintiff in error for

the possession of said office, and upon the refusal of the said plaintiff in error to comply with said reasonable demand the defendant in error herein brought an action in the nature of *quo warranto* in the Superior Court of Wake County, in said State, a court of competent jurisdiction, to oust the said plaintiff in error from the said office, and to induct the said relator therein, and for other relief.

That upon the trial in said Superior Court the presiding Judge thereof declined to submit any issues of fact to a jury, and rendered judgment in favor of the plaintiff and the relator in said action, and that the defendant appealed from said judgment to the Supreme Court of said State.

This respondent denies, as he is informed and believes, that any *supersedeas* bond was filed in the said Superior Court, but this respondent says that upon the hearing of said appeal being advanced in the Supreme Court of North Carolina the said respondent took no steps to get possession of the said office until the determination of the case in the said court; and the plaintiff in error continued to discharge its duties.

2. That the judgment in said appeal was rendered in said Supreme Court of North Carolina about 4:30 o'clock P. M. on the 23d day of December, 1897, and a writ was issued out of said court at 5:30 P. M. of said day, as set out in the third article of the affidavit of the plaintiff in error.

This respondent further says that the said writ was immediately placed in the hands of the Sheriff of Wake County by the Clerk of the said Supreme Court, and that said Sheriff, as this defendant is informed and believes, went to the offices of the Railroad Commission for the purpose of executing said writ, but that the said plaintiff in error was not to be found, and, as this respondent is informed and believes, was absent from the said county and State for the purpose of avoiding service of the same; that the doors of the said room were locked and no person was

left in charge thereof, and the persons having keys to said offices were purposely out of the city, and respondent is informed and believes and avers, for the purpose of preventing and hindering the execution of the said writ. That, as respondent is informed and believes, the said Sheriff left the said rooms with the avowed purpose of geting the keys or other means of entry therein, and did not return. And that this respondent, with L. C. Caldwell, who was in like case with himself, after waiting a reasonable time for the return of the said Sheriff, and being advised by counsel that he had good right in law so to do, procured the doors of said room to be opened, and entered therein and assumed to exercise the duties of the office of Railroad Commissioner.

Respondent found upon taking charge of said office that the seal of said Commission had been taken away, as he is informed and believes, by the late Chairman of said Commission, and caused to be deposited in one of the banks of Raleigh.

And affiant is advised, informed and believes that, having been accompanied by the Sheriff with said process in his hands, into the front porch of said Commission rooms, he was in contemplation of law placed in possession of the whole, and that he had the right to open the doors and remove any obstruction to the full possession and occupation of said Railroad Commission rooms and every part of the same.

3. That this respondent believes that a writ of error was sued out by the counsel of the plaintiff in error, and was allowed by the Chief Justice of the Supreme Court of North Carolina, as alleged in the fourth article of the petition, and that a paper purporting to be a bond, conditioned as required by law in cases of *supersedeas*, was tendered by said counsel and approved by said Chief Justice on the 23d day of December, 1897, and that the said writ of

error, with the petition therefor, and the assignment of error and the citation and bond were filed in the Clerk's office as alleged in said article of the petition. But this respondent denies that any notice of the filing of said bond was served upon him, or that he had any knowledge of the filing of said bond until the day after the occurrence herein set out, and he avers that the citation was not served upon him until the 25th day of December, 1897, at 3 o'clock P. M. And this respondent is advised and believes that the said bond, even if sufficient in law as a *supersedeas* bond, will not have any other effect in law than to stay proceedings for the enforcement of the judgment for costs in said action, and does not defer the relator's right to take possession of said office and hold the same.

This respondent has no knowledge nor information as to the allegations of said petition that his counsel, W. H. Day, Esq., went to the Clerk's office and examined said bond. And this respondent avers that neither said counsel nor any other person informed respondent of the filing of said bond.

That affiant did not communicate with or receive any advice or counsel from W. H. Day after the Sheriff of Wake County left the building in which the Railroad Commission offices are located, which was long prior to filing the *supersedeas* bond in the office of the Clerk of the Supreme Court of North Carolina.

This respondent denies that the Governor of North Carolina either before or after the copy of the writ of error was handed to him, if it was so handed, of which this respondent has no knowledge, sent for a locksmith and sent him with said Caldwell and Pearson with instructions to pick said locks and open the doors. But respondent avers that respondent with said Caldwell, on advice of counsel, believed then, and still believing that they had the right so

to do, procured the doors to be opened by a locksmith, without unnecessary force or violence, and entered and took possession of said offices.

This respondent denies that he well knew of the action of the Chief Justice in the premises. He admits that he had a conference with the Governor, and had from him information that the Chief Justice of North Carolina either had allowed or probably would allow the writ or error; but this respondent had no knowledge of any kind of the filing of any bond purporting to be a *supersedeas* bond or one the effect of which would be to effect a stay of proceedings in said action, until he saw an article in the newspapers of Raleigh on the morning after he had so gone into possession of said office.

4. That it is true, as alleged in the fifth article of the petition, that on the morning of the 24th of December, 1897, W. H. Day, Esq., as counsel for the relator, made a motion in the Supreme Court to set aside said *supersedeas*, and at the same time the petitioner's counsel made a motion that said execution, or writ of possession, be recalled on account of the *supersedeas*, and that both motions were refused.

This respondent says that the opinion delivered by said Court upon said motions is filed herewith. He admits that since that time he, with said Caldwell, has begun to discharge the duties of the said office of Railroad Commissioner, and the Commission has held a regular meeting for the transaction of business. And this respondent, as he is advised and believes, avers that the plaintiff in error has no rights in the premises. That this defendant relies upon the law as applied to the facts set out in the transcript and record filed by petitioner, and respectfully submits to this honorable Court that he has acted strictly within the rights and duties imposed upon him by law and under advice of counsel learned in the law.

And he expressly disclaims and denies that any act of his in the premises was done in contempt of this honorable Court.

And having thus fully answered, your respondent prays to be hence dismissed with his costs, and your respondent will ever pray, etc.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF NORTH CAROLINA.

John H. Pearson, being duly sworn, deposes and says that the foregoing answer is true of his own knowledge, except as to allegations therein made on information and belief, and as to those matters he believes it to be true.

Sworn and subscribed before me this ____ day of January, 1898.

No. 305.

NORTH CAROLINA SUPREME COURT,

SEPTEMBER TERM, 1897.

L. C. CALDWELL
vs.
J. W. WILSON. } *From Iredell.*

Clark, J. This is a motion by defendant to recall the execution which issued to put the relator in possession of the furniture, rooms and other tangible property belonging to the Railroad Commission. The relator moved to set aside the *supersedeas* proceedings or adjudge them irregular. We are of opinion that we have no power to set aside the writ of error or pass the regularity thereof. We are also of opinion that the judgment of this Court *ex proprio vigore* placed the relator in possession of the office at the time the judgment was filed. He having already qualified, no pro-

cess was necessary for that purpose. He is in full possession of the same and in full power to exercise its duties, and draw the salary thereto attached, from the date of his appointment. The judgment took effect immediately upon being filed, and is not superseded by the subsequent writ of error, regular or irregular. *Foster* v. *Kansas*, 112 U. S., 201. The relator being in office by virtue of the judgment of this Court, any attempt by the defendant to exercise its functions, or to interfere with the full and free exercise thereof by the relator, and any attempt by any one else to interfere by alleged legal process or otherwise, unless and until the Supreme Court of the United States shall reverse the judgment of this Court, will be a contempt of this Court. We decline to make any order recalling the execution. Both motions refused.

No. .....

UNITED STATES OF AMERICA,

IN THE SUPREME COURT.

OCTOBER TERM, 1897.

S. OTHO WILSON, *Plaintiff in Error*,

versus

THE STATE OF NORTH CAROLINA, BY Z. V. WALSER, ATTORNEY GENERAL, ON THE RELATION OF JOHN H. PEARSON, *Defendant in Error.*

W. H. Day, being duly sworn, says he is of counsel for the defendant in error in the above entitled cause. That on the evening of the 22d of December, 1897, he was present when the Sheriff of Wake County went with the defendant Caldwell and J. H. Pearson to the offices of the Railroad Commission. That said Sheriff went to the doors of the Commission rooms, fronting on the porch on Edenton Street. That said doors were locked. The Sheriff and said Caldwell and Pearson then passed through the hall, between the Railroad Commission rooms and the Agricultural rooms, to the rear door of said Commission offices on the hall. That this door was also locked. The Sheriff was requested by this affiant to force said door and put the defendant in error in possession of said offices.

The Sheriff replied, he did not want to force the door, but would go for the janitor of the building and get the key, return, and put them in possession. That if the janitor

did not have the key, he would return and force the door, and put them in possession. That the Sheriff then left and did not return. That this affiant then advised the defendant that he had the right to force said doors, and enter and take possession of the Railroad Commission offices. That this was long prior to the filing of the writ of error and *supersedeas* bond in the office of the Clerk of the Supreme Court of North Carolina. That this affiant then left, and did not see or communicate with the defendant in error till the succeeding day. That this affiant went to the office of the Clerk of the Supreme Court, and saw the writ of error and *supersedeas* bond, about two hours after he left the Railroad Commission office, but he did not see defendant in error or communicate with them after he saw said writ of error and *supersedeas* bond, till the next day. W. H. Day.

Sworn and subscribed before me, this 11th day of January, 1898. N. J. Riddick,
Clerk U. S. Circuit Court, Eastern District N. C.

NORTH CAROLINA—Wake County.

H. C. Brown, being duly sworn, says: That he is now Clerk to the Board of Railroad Commission in and for the State of North Carolina, and has been since its organization, under the Act of the General Assembly of 1891.* That said Railroad Commission has a seal; that the same was taken from the office of said Railroad Commission between the first and fifteenth day of December, 1897, by James W. Wilson, one of the former Commissioners, and Chairman of said Commission; and the said seal was kept out of said office until the 25th day of December, 1897, when said Wilson notified affiant that said seal of office was at the Citizens Bank, subject to his order. H. C. Brown.

Sworn to and subscribed before me, this January 13th, 1898. A. B. Andrews,
Notary Public, Wake County, N. C.

No. .....

UNITED STATES OF AMERICA,

IN THE SUPREME COURT.

S. OTHO WILSON, *Plaintiff in Error,*

versus

THE STATE OF NORTH CAROLINA AND Z. V. WALSER, ATTORNEY-GENERAL, ON THE RELATION OF JOHN H. PEARSON, *Defendant in Error.*

Respondent's Brief on the Motion to Attach for Contempt.

The respondent respectfully submits that he has not been guilty of contempt of this Honorable Court—

I. Because the judgment of the Supreme Court of North Carolina was in itself self-executing, and needed no writ to enforce it.

The Code of North Carolina, sec. 611, is as follows: "If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he shall be entitled, after taking the oath of office and executing such official bond as may be required by law, *to take upon himself the execution of the office;* and it shall be his duty, immediately thereafter, to demand of the defendant in the action all the books and papers in his custody or within his power belonging to the office from which he shall have been excluded."

The judgment of the Superior Court, affirmed by and made the final judgment of the Supreme Court of North Carolina, operated of itself to suspend the plaintiff in error from the office of Railroad Commissioner. There was no vacancy, because it had already been filled by appointment of the Governor under the law—Acts of 1891, ch. 320, sec. 1.

Respondent had already qualified by taking the oath of office immediately upon his appointment, and no bond was required of him.

There was no undue haste, either on the part of the respondent or of the Courts; the policy of the law requires the trial of such cases to be expedited. Code of North Carolina, sec. 616.

In pursuance of this policy, on application of counsel for relator, in open Court, no objection being made thereto (see opinion of Mr. Justice Clark attached to respondent's answer), the Supreme Court rendered final judgment and directed process to issue under section 957 of The Code of North Carolina.

The respondent being already in office by virtue of his appointment and of the judgment, it required no writ to put him in. But the Sheriff, in obedience to the writ, went with respondent upon the porch of the building and to the door of the Commission rooms, and, finding it closed, left him there.

The suspended officers were absent, as respondent swears, to avoid service of the writ; the clerk and janitor were gone, the seal removed, the doors locked.

The respondent had been by the final judgment declared the rightful incumbent, and by the statute directed to take possession.

We submit that, being in the building, if he had had the key, he might have unlocked the door and gone in; he was to all intents and purposes in possession, and the Sheriff's duty was performed immediately after 5.30 p. m., there being no physical opposition to the entry of respondent, requiring the power of the county to overcome it.

This was more than an hour before the filing of the writ of error and bond in the office of the Clerk of the Supreme Court—at 7.10 o'clock on the same day—and it made no difference that respondent did not procure the doors to be opened for some hous later.

Herman on Executions, § 529.
Freeman on Executions, §§ 473, 474.

Relator should be left in quiet possession; here there was no one to remove from the office or rooms. What was more appropriate to be done than for the relator to have quietly sent for a locksmith and had the door opened.

"Where, upon *quo warranto*, there is a judgment that the relator is entitled to the office, and that defendant be ousted and pay costs, and he appeals to the Supreme Court and files a *supersedeas* bond in the form provided by law: Held that from such judgment an appeal will lie, and that the *supersedeas* bond will stay proceedings for the enforcement of the judgment for costs, but does not defer the relator's right to take possession of the office under chapter 6, section 20 of The Code, no process being required to execute the judgment in that respect.

Fawcett *v.* Superior Court, 15 Washington Rep., 342.
S. C. 55 Am. St. Rep., 894.
Joyse *v.* Drorburgh, 63 Iowa, 711.

"Upon a judgment of amotion from office, the party amoved is divested of all official authority and excluded from office so long as the judgment remains in force." (High on Ex. Rem., § 756). And when judgment is rendered in favor of a relator, he needs no writ to invest him with the office. Under section 8639, How. Stat., he is entitled to take upon himself the execution of the office. Can this right be defeated or suspended by suing out a writ of error and giving a bond to stay execution? The statute (secs. 8697,

8681) provides for a stay of execution by suing out a writ of error, but does not authorize a suspension of a judgment which requires no aid from process to give it effect. The practical result of permitting such a writ to suspend the judgmeut in *quo warranto* cases *would in many cases be to defeat the relator of his remedy wholly.* Such a construction is not to be indulged, except it be imperatively required by the terms, which we think is not the case here."

People *ex rel.* Wagenseil *v.* Stephenson, 98 Mich., 218.

"Upon the rendition of a regular judgment of ouster in the suit of the people against a public officer, and in favor of another individual for the office, the officer becomes actually ousted and excluded from office, and the party declared to be entitled, upon taking the official oath and filing his bond (when required), becomes, *eo instanti*, invested with the office and entitled under section 437 of The Code to demand and have the books and papers appertaining to the office."

Welsh *v.* Cook, 7 How. Pr. Rep., 282, especially pages 285–6.

Section 437 of the New York Code is substantially the same as section 611 of the North Carolina Code.

"A judgment suspending an attorney from practice executes itself, except as to the collection of costs, and is not affected by an appeal therefrom to the Supreme Court and obtaining a *supersedeas.*"

Walls *v.* Palmer, 64 Ind., 493.

"Under a statutory provision that 'if judgment be rendered in favor of such claimant he shall proceed to exercise the functions of the office after he has qualified as required by law,' a *supersedeas* bond filed on appeal to the Supreme Court from a judgment in favor of the claimant stays proceedings for the enforcement for costs, but does not defer

the relator's right to take possession of the office, no process being required to execute the judgment in that respect."

Payne on Elections, 852.
Mechem on Pub. Office, sec. 497.

"The judgment requires no aid from process to give it effect. 98 Mich., *supra*. His appeal, in the absence of an express provision of the law to the contrary, did not, and could not, in the very nature of things, affect the judgment; the judgment was not annulled thereby, but it remained in full force and effect. Such seems to be the uniform rulings of all Courts on this question. The authorities cited above seem to be conclusive on these points, and a number of them expressly hold that a *supersedeas* does not lie in a contested election case, and there is not a single authority to the contrary, so far as we can ascertain."

State *ex rel.* Craig *v.* Woodson, 128 Mo., at p. 506.

"Sec. 1007 of the Rev. Stat., which, as amended by the Act of February 18, 1875 (18 Stat., part 3, p. 316), provides that where a writ of error may operate as a *supersedeas*, execution shall not issue until the expiration of ten days after the rendition of the judgment, has reference only to the judgments of the courts of the United States."

Doyle *v.* Wisconsin, 94 U. S., 50.

II. But if it had been necessary that the Sheriff should have gone further in execution of the writ by opening the door, and if the bond filed did not have the effect of a *supersedeas* as contended by the plaintiff in error, we respectfully submit that there can be no contempt without the intent to commit it—in this case to disobey an order of this Court. And respondent swears he did not know of the filing of the bond in the Clerk's office at the time he took possession of the rooms and assumed the office, and not until the next day. And further, that he acted under advice of counsel.

The better, but, as we shall see, not the unanimous opinion, is that on a rule to show cause why a party should not be punished for contempt, the actual intention of the party is material, and if the respondent disavows, upon oath, any intention of committing a contempt, the rule will be discharged.

Rapalge on Contempt, § 121.
In re Moore, 63 N. C., 397.
Re Walker, 82 N. C., 95.
Bond *v.* Bond, 69 N. C., 97.

JAS. C. MACRAE,
W. H. DAY,
A. C. AVERY,
Attorneys for Respondent.

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH.

No. 558.

Motion by D. C. to Dismiss or Affirm.

FILED.
JAN 17 1893
JAMES H. McKENNEY,
CLERK.

UNITED STATES OF AMERICA,

IN THE SUPREME COURT.

JAMES W. WILSON, PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA, ON THE RELATION OF L. C. CALDWELL, DEFENDANT IN ERROR.

Comes now the defendant in error by its attorneys, Jas. C. MacRae, W. H. Day and A. C. Avery, and moves the Court to dismiss the appeal in the above entitled cause for want of jurisdiction, because the judgment upon which the said writ of error was allowed is the judgment of the Supreme Court of the State of North Carolina.

And the said defendant in error, by counsel as aforesaid, also moves to affirm the said judgment because, although the record in the said cause may show that this Court has jurisdiction in the premises, yet it is manifest that said appeal is frivolous and was taken for delay only.

Jas C MacRae
W H Day
A C Avery

Counsel for the Defendant in Error
for the purposes of these motions.

No. 559.
Mo. to Dismiss or Affirm

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FILED.
JAN 17 1898
JAMES H. McKENNEY,
CLERK.

No. 559.

UNITED STATES OF AMERICA,

IN THE SUPREME COURT.

S. OTHO WILSON, PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA, BY Z. V. WALSER, ATTORNEY-GENERAL, ON THE RELATION OF JOHN H. PEARSON, DEFENDANT IN ERROR.

Comes now the defendant in error by its attorneys, Jas. C. MacRae, W. H. Day and A. C. Avery, and moves the Court to dismiss the appeal in the above entitled cause for want of jurisdiction, because the judgment upon which the said writ of error was allowed is the judgment of the Supreme Court of the State of North Carolina.

And the said defendant in error, by counsel as aforesaid, also moves to affirm the said judgment because, although the record in the said cause may show that this Court has jurisdiction in the premises, yet it is manifest that said appeal is frivolous and was taken for delay only.

J. C. MacRae
W. H. Day
A. C. Avery

Counsel for the Defendant in Error for the purposes of these motions.

No. 558.

Brief of Avery, MacRae & Day for D.

No. 558.

Filed Jan. 26, 1898.

(In the Supreme Court, U. S.
FILED
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1897.

JAMES W. WILSON, PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA ON THE RELATION OF L. C. CALDWELL, DEFENDANT IN ERROR.

Brief of A. C. Avery, J. C. MacRae, Wm. H. Day, Counsel for Defendant in Error, on the Motion to Dismiss and Affirm.

Defendant in error respectfully submits that his motion should be granted—

1. Because no Federal question is really involved in the determination of the controversy between the parties to the action.

The plaintiff in error invokes the jurisdiction of this Honorable Court, upon the grounds—

(1). That his suspension from the office of Railroad Commissioner by the Governor of North Carolina, and in pursuance of the act creating his office, was without due process of law.

(2). That by such action of the Governor he was deprived of the equal protection of the laws.

(3 and 4). That the refusal of the Superior Court, in the action of quo warranto, to submit issues to a jury, and its ruling that the statute and the action of the Governor did not deprive him of his liberties and property without due process of law, and did not deprive him of the equal protection of the laws, were in violation of the 14th amendment to the Constitution of the United States.

The Governor of North Carolina suspended the plaintiff in error on the 23d of September, 1897, under the authority of Section 1, Chapter 320, Laws of 1891, which provided that if a Railroad Commissioner should have any interest in any way in a railroad company, or in case he should become disqualified to act, it should be the duty of the Governor to suspend him from office, and report the fact of his suspension, together with the reasons therefor, to the next General Assembly; and the question of his removal from office was to be determined by a majority of the General Assembly in joint session; and the Governor was empowered to fill the vacancy caused by such suspension. So careful, however, was the law of the rights of the suspended Commissioner, that if the next General Assembly did not remove him, he was to be re-instated in office, and draw his salary for the period of his suspension.

The Governor duly appointed the relator, who immediately qualified and made demand for the office. The Supreme Court of the State have construed the said statute and have held, that its provisions are not in conflict with the Constitution of the State, that it confined the authority to suspend to the Governor, and that the relator is rightfully holding and discharging the duties of the said office. (See the act cited in the opinion of the Court, on page 27 of the record.)

"Whether statutes of a Legislature or a State have

been duly enacted in accordance with the requirements of the Constitution of such State, is not a Federal question, and the decision of State Courts as to what are the laws of the State is binding upon the Courts of the United States." Leeper v. Texas, 139 U. S., 463, 467, and authorities cited, especially South Ottawa v. Perkins, 94 U. S., 260, 268.

2. If the interpretation of the statute did not deprive the plaintiff in error of equal and impartial justice, as administered to other persons belonging to the same class as himself, the administration of that law, as it has been enforced, was due process.

Leeper v. Texas, supra.

"If the Supreme Court of the State has acted in consonance with the constitutional laws of the State, and its own procedure, it could only be in very exceptional circumstances, that this Court would feel justified in saying that there had been a failure of due process of law."

Allen v. Georgia, 166 U. S., 138, 140.
Harvey v. Elliott 167 U. S., 409, 443.
Giazza v. Tiernan, 148 U. S., 657, 661.
Duncan v. Missouri, 152 U. S., 377.

The Governor in his order of suspension and appointment to fill the vacancy, calls attention to the fact that if the suspended Commissioner shall refuse to surrender the office, due process of law shall be invoked in the enforcement of his order. (See page — of the record.)

Our presence here, plaintiff in error still seeking to act in defiance of his suspension, the action brought in the State Courts by defendant in error, shows due process of law.

3. "Wherever the law operates alike on all persons

and property similarly situated, equal protection cannot be said to be denied."

Walston v. Nevin, 128 U. S., 578, 582.

4. It was the province of the State Courts to determine whether the plaintiff in error was entitled to a trial by jury of his right to the office, and if the Supreme Court of the State, following its own rulings as to others similarly situated, has held that he has no right to demand that mode of trial he has not been the denied the equal protection of the law, or due process thereunder.

Kennard v. Louisiana, 92 U. S., 480.

Hartads v. California, 110 U. S., at page 532 et seq.

5. The Supreme Court of North Carolina held an act constitutional which conferred upon a single Justice of that Court supervisory jurisdiction over the Clerks of Superior Courts in the appointment of judges of election, and held also, that the supervisory power carried with it by implication the authority to remove a judge of election, already inducted into office.

Harkins v. Cathey, 119 N. C., 649.

McDonald v. Morrow, 119 N. C., 666, 676.

In McDonald v. Morrow, supra, at page 677, the Court said:

"This provision of the statute (that in reference to the supervisory power construed to include authority to remove) entered into and became a part of the contract or terms under which they accepted these offices to the same extent as if it had been an express stipulation between the parties."

McCless v. Meekins, 117 N. C., 34, and authorities there cited.

This distinguishes it from Hoke v. Henderson (4 Dev., 1).

The last-named case was that chiefly relied upon by counsel for plaintiff in error in the discussion before the Supreme Court of North Carolina. (See also authorities cited in the opinion of Justice Douglas, on page 39 of the printed record, especially Ward v. Elizabeth City, 27 S. E. Rep., 993 (121 N. C.)

In Ward v. Elizabeth City, supra, the Court said in substance, that while that Court had differed with almost all of the States in holding that an office, which is created by a Legislature (and does not owe its existence to the State Constitution) involves a contract, and that where the Legislature in the act creating it inserted a provision affecting the tenure, such limitation upon the tenure became a part of the contract. So that where the Legislature has, as in this act conferred on the Governor the power of suspension, one who takes the office in contemplation of such a provision, enters into an agreement to abide by it.

Whether the power of suspension or removal grows out of the doctrine, that there is an implied right in the principal to revoke an agency, or is derived from the express terms of a statute, which the incumbent by acceptance has made an express stipulation of the contract under which he holds, there is no just ground for complaint. The legal effect of a removal or suspension under the terms of an express agreement, must be practically the same, as where the authority is implied from the relation between the party exercising, and the person subject to the exercise of the authority.

6. The Constitution of North Carolina has been construed as vesting in the Legislature all of the residuary powers, or all powers not delegated to the Federal Gov-

ernment or by the State Constitution to one or the other co-ordinate departments.

McDonald v. Morrow, 119 N. C., 670.
Ewart v. Jones, 116 N. C., 570.

The Court in this case (see opinion of Justice Douglas, bottom of page 39 of the record) rested its ruling upon the ground that the plaintiff in error accepted his office subject to whatever law the Legislature might in the exercise of its constitutional powers, see fit to pass, citing:

Ewart v. Jones, 116 N. C., 570.
McDonald v. Morrow, 119 N. C., 666, 670.
Head v. University of Mo., 19 Wallace, 526.

7. The authorities already cited establish the principle that the Supreme Court of the United States will consider binding the construction placed by the highest Courts of a State upon its own Constitution and laws made in pursuance of it.

In the opinion of Justice Douglas (page 41 of the printed record) the Railroad Commission was held to be a mere administrative board, not coming up to the dignity of a Court of Record of general jurisdiction. Citing

Express Company v. Railroad, 111 N. C., 463, 474.
Reagan v. Farmer's L. and T. Co., 154 U. S., 394.

8. But, if it be conceded that the statute passed subsequently to that creating the Commission and during the same session (Laws of North Carolina, 1891, Chapter 498, page 565), constituted it a Court of Record inferior to the Supreme Court and of limited jurisdiction, the fact would still remain that it is a legislative office, created under the authority of Sections 2 and 30 of Article 4 of the Constitution of North Carolina, which em-

powers the General Assembly to establish by law, "Courts inferior to the Supreme Court, prescibe the manner of electing the Judges and fix their terms of office, not to exceed eight years; and the rule laid down by the Supreme Court of North Carolina, is, that the Legislature has the power under the Constitution to remove or provide for the removal of all such officers, as it has the power to create, in the absense of any express prohibition (which it is not contended exists) in the State Constitution."

In Ward v. Elizabeth City, 27 S. E. Rep., 993 (121 N. C.), the Court said:

"Every one who accepts an office created by legislative enactment, takes it with notice that the Legislature has power to abolish his office and is fixed with acceptance of all the provisions of the act creating the office." So it is contended for the relator here, that the plaintiff in error accepted the office with the provision, that the Governor might exercise the right to suspend him when he should deem it just to do so, subject to the power of restoration by the next Legislature, reserved in the statute. The Constitution of the State will be searched in vain for any provision prohibiting the Legislature from conferring such a power on the Governor.

He is not deprived of the equal protection of the laws by reason of the fact that a process of removal or suspension is made to apply to Railroad Commissioners which does not apply to Judges of other Courts. If he is a Judge, there is no provision of the Constitution of North Carolina that Judges shall be tried by impeachment.

"We are to look, not at the Constitution, but to the statute law to ascertain what persons are liable to impeachment."

People v. Heaton, 77 N. C., 18.

If the statute can provide for the trial of a public officer by impeachment, it can provide other modes of trial, and this it does.

Special legislation is not obnoxious to the Fourteenth Amendment, if all persons subject to it are treated alike.

"But the privileges and immunities of citizens of the United States, protected by the Fourteenth Amendment, are privileges and immunities arising out of the nature and essential character of the Federal Government and granted or secured by the Constitution; and due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

Duncan v. Missouri, 152 U. S., 377.

This law bears equally on all Railroad Commissioners.

Cooley C. L., 14.
Black Con., 405.

If this act deprives him of the equal protection of the laws, the Interstate Commerce Act is void for the same reason.

Sec. 11 of said Act, February 4, 1887.

9. The refusal to grant the plaintiff in error a trial by jury of the issues tendered was not a denial of due process, or a failure to extend to him the equal protection of the law.

"Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State."

Walker v. Sauvinet, 92 U. S., 90.

The plaintiff in error has no property nor vested right

in the ancient right of trial by jury, if the State imposes limitations upon such right.

Mumm v. Illinois, 94 U. S., 113, 114.
Missouri v. Lewis, 101 U. S., 22, 31.

Under the law of North Carolina it has been held, that a person may waive his constitutional right to insist upon a trial by jury, of issues involving his title to the most valuable property, by neglecting to assert and insist upon such right in apt time, or by conduct inconsistent with the apparent purpose of insisting on such right, whereby his adversary is misled or not put on notice so that he may prepare for trial. Driller Company v. Worth, 117 N. C., 515; and in the same case, 118 N. C., 746, it was held that a party might be deprived of the right of trial by jury by his own consent, and that such consent would be implied and the right waived by a failure to object to an order of compulsory reference when made, or by a subsequent failure to assert the claim definitely and specifically in exceptions filed so as to give notice to his adversary of the precise issues upon which preparation for trial is to be made.

It was also declared in the opinions in those cases, that the right to trial by jury may be waived by implication, by failure of a party to appear, or expressly by written agreement, or by oral consent, entered of record.

The rulings of the Court in this case, that, by acceptance of the office under the provisions of the statute that the Governor should exercise at his discretion the power of suspension, the plaintiff in error expressly waived his right of trial by jury, are in consonance with the principle laid down in other cases, involving the right to property, and follow the principles stated in McDonald v. Morrow, 119 N. C., 677, which hold that

in such cases the statute constitutes a part of the terms of the contract between the State and the office-holder under it.

And in the case before us all the facts alleged in the complaint were admitted in the answer. There were no issues to be tried; the question before the Court was whether, under these facts and the law, the Governor had power to suspend and appoint, and did he act within the powers confided to him by law.

10. The power to suspend the Commissioners was conferred upon the Governor in order to meet an emergency, when it should appear to him during the recess between sessions of the Legislature, that one or more of these officers had become interested in a railway company operating in the State, so as to preclude the possibility of his being a fair judge.

It is inherent in the office of a Judge, that he should be subject to suspension, removal or disqualification to act when he becomes interested in the matters to be adjudicated, and the Legislature alone is clothed with the power to provide the procedure for removal in such cases.

1 Blackstone, 91.
Broom's Legal Maxims, 118.
White v. Connelly, 105 N. C., pp. 69, 70, 71.

We respectfully contend that the plaintiff in error has mistaken the idea of the protection guaranteed to the citizen of the United States by the Fourteenth Amendment. Discussing the effect of this amendment, Black's Constitutional Law, page 463, says:

"In this connection, it is important to observe that the privileges and immunities here protected are those of the citizens of the United States (not of the citizens of a State), and that they are such only as belong to those citizens in virtue of their citizenship. Another

part of the Constitution guarantees to the citizens of each State the privileges and immunities of citizens in the several States. But the Fourteenth Amendment is not supplementary to that clause, and has no relation to it. It deals with a different matter, viz., the rights of citizens of the United States as such. It would be perhaps, too narrow a construction to say that these rights must all be political in their character, or related to the status of citizenship. But it is clear that they must have some relation to the legitimate operations of the general government, to the purposes for which it was created, or to the powers which are committed to it."

We invite attention also to the distinction between citizenship of the United States and that of a State, in the light of the Fourteenth Amendment, as set out by this Court in the Slaughter House cases, 116 U. S., at page 74, et seq.

It is sufficient to ask, how can this constitutional provision affect a citizen of North Carolina, an office-holder, by virtue of the laws of his own State, in regard to restrictions placed by the laws of North Carolina upon the exercise of the office created by the laws?

11. The appeal is manifestly frivolous if our contention is correct that no Federal question is involved, and we submit that the same should be dismissed.

Its only affect can be delay, in order that the plaintiff in error may retain possession of his office until action is taken by the next Legislature of North Carolina, and so defeat the object of the act creating the office, which is to prevent interested men from deciding questions of vital importance arising between the people and the quasi public corporations.

A. C. AVERY,
J. C. MACRAE,
W. H. DAY,
Counsel for Defendant in Error.

No. 559.

Office Supreme Court, U. S.
FILED
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

S. OTHO WILSON, PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA, BY ZEB. V. WALSER, ATTORNEY GENERAL, ON THE RELATION OF JOHN H. PEARSON.

Brief of A. C. Avery, J. C. RacRae, Wm. H. Day, Counsel for Defendant in Error, on the Motion to Dismiss and Affirm.

Defendant in error respectfully submits that his motion should be granted—

1. Because no Federal question is really involved in the determination of the controversy between the parties to the action.

The plaintiff in error invokes the jurisdiction of this Honorable Court, upon the grounds—

(1). That his suspension from the office of Railroad Commissioner by the Governor of North Carolina, and in pursuance of the act creating his office, was without due process of law.

(2). That by such action of the Governor he was deprived of the equal protection of the laws.

(3 and 4). That the refusal of the Superior Court, in the action of quo warranto, to submit issues to a jury, and its ruling that the statute and the action of the Governor did not deprive him of his liberties and property without due process of law, and did not deprive him of the equal protection of the laws, were in violation of the 14th amendment to the Constitution of the United States.

The Governor of North Carolina suspended the plaintiff in error on the 23d of September, 1897, under the authority of Section 1, Chapter 320, Laws of 1891, which provided that if a Railroad Commissioner should have any interest in any way in a railroad company, or in case he should become disqualified to act, it should be the duty of the Governor to suspend him from office, and report the fact of his suspension, together with the reasons therefor, to the next General Assembly; and the question of his removal from office was to be determined by a majority of the General Assembly in joint session; and the Governor was empowered to fill the vacancy caused by such suspension. So careful, however, was the law of the rights of the suspended Commissioner, that if the next General Assembly did not remove him, he was to be re-instated in office, and draw his salary for the period of his suspension.

The Governor duly appointed the relator, who immediately qualified and made demand for the office. The Supreme Court of the State have construed the said statute and have held, that its provisions are not in conflict with the Constitution of the State, that it confined the authority to suspend to the Governor, and that the relator is rightfully holding and discharging the duties of the said office. (See the act cited in the opinion of the Court, on page 27 of the record.)

"Whether statutes of a Legislature or a State have

been duly enacted in accordance with the requirements of the Constitution of such State, is not a Federal question, and the decision of State Courts as to what are the laws of the State is binding upon the Courts of the United States." Leeper v. Texas, 139 U. S., 463, 467, and authorities cited, especially South Ottawa v. Perkins, 94 U. S., 260, 268.

2. If the interpretation of the statute did not deprive the plaintiff in error of equal and impartial justice, as administered to other persons belonging to the same class as himself, the administration of that law, as it has been enforced, was due process.

Leeper v. Texas, supra.

"If the Supreme Court of the State has acted in consonance with the constitutional laws of the State, and its own procedure, it could only be in very exceptional circumstances, that this Court would feel justified in saying that there had been a failure of due process of law."

Allen v. Georgia, 166 U. S., 138, 140.
Harvey v. Elliott 167 U. S., 409, 443.
Giazza v. Tiernan, 148 U. S., 657, 661.
Duncan v. Missouri, 152 U. S., 377.

The Governor in his order of suspension and appointment to fill the vacancy, calls attention to the fact that if the suspended Commissioner shall refuse to surrender the office, due process of law shall be invoked in the enforcement of his order. (See page — of the record.)

Our presence here, plaintiff in error still seeking to act in defiance of his suspension, the action brought in the State Courts by defendant in error, shows due process of law.

3. "Wherever the law operates alike on all persons

and property similarly situated, equal protection cannot be said to be denied."

Walston v. Nevin, 128 U. S., 578, 582.

4. It was the province of the State Courts to determine whether the plaintiff in error was entitled to a trial by jury of his right to the office, and if the Supreme Court of the State, following its own rulings as to others similarly situated, has held that he has no right to demand that mode of trial he has not been the denied the equal protection of the law, or due process thereunder.

Kennard v. Louisiana, 92 U. S., 480.

Hartads v. California, 110 U. S., at page 532 et seq.

5. The Supreme Court of North Carolina held an act constitutional which conferred upon a single Justice of that Court supervisory jurisdiction over the Clerks of Superior Courts in the appointment of judges of election, and held also, that the supervisory power carried with it by implication the authority to remove a judge of election, already inducted into office.

Harkins v. Cathey, 119 N. C., 649.

McDonald v. Morrow, 119 N. C., 666, 676.

In McDonald v. Morrow, supra, at page 677, the Court said:

"This provision of the statute (that in reference to the supervisory power construed to include authority to remove) entered into and became a part of the contract or terms under which they accepted these offices to the same extent as if it had been an express stipulation between the parties."

McCless v. Meekins, 117 N. C., 34, and authorities there cited.

This distinguishes it from Hoke v. Henderson (4 Dev., 1).

The last-named case was that chiefly relied upon by counsel for plaintiff in error in the discussion before the Supreme Court of North Carolina. (See also authorities cited in the opinion of Justice Douglas, on page 39 of the printed record, especially Ward v. Elizabeth City, 27 S. E. Rep., 993 (121 N. C.)

In Ward v. Elizabeth City, supra, the Court said in substance, that while that Court had differed with almost all of the States in holding that an office, which is created by a Legislature (and does not owe its existence to the State Constitution) involves a contract, and that where the Legislature in the act creating it inserted a provision affecting the tenure, such limitation upon the tenure became a part of the contract. So that where the Legislature has, as in this act conferred on the Governor the power of suspension, one who takes the office in contemplation of such a provision, enters into an agreement to abide by it.

Whether the power of suspension or removal grows out of the doctrine, that there is an implied right in the principal to revoke an agency, or is derived from the express terms of a statute, which the incumbent by acceptance has made an express stipulation of the contract under which he holds, there is no just ground for complaint. The legal effect of a removal or suspension under the terms of an express agreement, must be practically the same, as where the authority is implied from the relation between the party exercising, and the person subject to the exercise of the authority.

6. The Constitution of North Carolina has been construed as vesting in the Legislature all of the residuary powers, or all powers not delegated to the Federal Gov-

ernment or by the State Constitution to one or the other co-ordinate departments.

McDonald v. Morrow, 119 N. C., 670.
Ewart v. Jones, 116 N. C., 570.

The Court in this case (see opinion of Justice Douglas, bottom of page 39 of the record) rested its ruling upon the ground that the plaintiff in error accepted his office subject to whatever law the Legislature might in the exercise of its constitutional powers, see fit to pass, citing:

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It was also declared in the opinions in those cases, that the right to trial by jury may be waived by implication, by failure of a party to appear, or expressly by written agreement, or by oral consent, entered of record.

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in such cases the statute constitutes a part of the terms of the contract between the State and the office-holder under it.

And in the case before us all the facts alleged in the complaint were admitted in the answer. There were no issues to be tried; the question before the Court was whether, under these facts and the law, the Governor had power to suspend and appoint, and did he act within the powers confided to him by law.

10. The power to suspend the Commissioners was conferred upon the Governor in order to meet an emergency, when it should appear to him during the recess between sessions of the Legislature, that one or more of these officers had become interested in a railway company operating in the State, so as to preclude the possibility of his being a fair judge.

It is inherent in the office of a Judge, that he should be subject to suspension, removal or disqualification to act when he becomes interested in the matters to be adjudicated, and the Legislature alone is clothed with the power to provide the procedure for removal in such cases.

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White v. Connelly, 105 N. C., pp. 69, 70, 71.

We respectfully contend that the plaintiff in error has mistaken the idea of the protection guaranteed to the citizen of the United States by the Fourteenth Amendment. Discussing the effect of this amendment, Black's Constitutional Law, page 463, says:

"In this connection, it is important to observe that the privileges and immunities here protected are those of the citizens of the United States (not of the citizens of a State), and that they are such only as belong to those citizens in virtue of their citizenship. Another

part of the Constitution guarantees to the citizens of each State the privileges and immunities of citizens in the several States. But the Fourteenth Amendment is not supplementary to that clause, and has no relation to it. It deals with a different matter, viz., the rights of citizens of the United States as such. It would be perhaps, too narrow a construction to say that these rights must all be political in their character, or related to the status of citizenship. But it is clear that they must have some relation to the legitimate operations of the general government, to the purposes for which it was created, or to the powers which are committed to it."

We invite attention also to the distinction between citizenship of the United States and that of a State, in the light of the Fourteenth Amendment, as set out by this Court in the Slaughter House cases, 116 U. S., at page 74, et seq.

It is sufficient to ask, how can this constitutional provision affect a citizen of North Carolina, an office-holder, by virtue of the laws of his own State, in regard to restrictions placed by the laws of North Carolina upon the exercise of the office created by the laws?

11. The appeal is manifestly frivolous if our contention is correct that no Federal question is involved, and we submit that the same should be dismissed.

Its only affect can be delay, in order that the plaintiff in error may retain possession of his office until action is taken by the next Legislature of North Carolina, and so defeat the object of the act creating the office, which is to prevent interested men from deciding questions of vital importance arising between the people and the quasi public corporations.

A. C. AVERY,
J. C. MACRAE,
W. H. DAY,
Counsel for Defendant in Error.

PLAINTIFF'S BRIEF

FILED.
FEB 15 1898
JAMES H. McKENNEY,
CLERK

No. 558 & 559.
Brf. of Burton for P. E. Com mo

Filed Feb. 15, 1898.

Nos. 558 and 559.

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1898.

JAS. W. WILSON, PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA ON THE RELATION OF L. C. CALDWELL, DEFENDANT IN ERROR,

AND

S. OTHO WILSON, PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA, BY Z. V. WALSER, ATTORNEY GENERAL, ON THE RELATION OF JOHN H. PEARSON, DEFENDANT IN ERROR.

Brief of Plaintiff in Error on Motion to Dismiss or Affirm.

R. O. BURTON,
Counsel for Plaintiff in Error.

Nos. 558 and 559.

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THE STATE OF NORTH CAROLINA, BY Z. V. WALSER, ATTORNEY GENERAL, ON THE RELATION OF JOHN H. PEARSON, DEFENDANT IN ERROR.

Brief of Plaintiff in Error on Motion to Dismiss or Affirm.

STATEMENT OF FACTS.

This is an action in the nature of *quo warranto*, to oust the the plaintiff in error from his office of Railroad Commissioner.

Jas. W. Wilson was elected Railroad Commissioner for the term beginning April 1, 1892, and ending April 1, 1899. On

the 24th of August, 1897, Daniel L. Russell, Governor, sent to him the following letter:

To JAMES W. WILSON, ESQ., *Member of the Railroad Commission of North Carolina:*

SIR:—By section first of the Railroad Commission Act, ratified the 5th day of March, 1891, it is made the duty of the Governor to suspend from office any Railroad Commissioner who shall be the holder of "any stock or bond of any railroad company, or be the agent or employee of any such company, or have any interest in any way in such company, or in case any one of them shall be disqualified to act." It is alleged that you are the joint owner with Col. A. B. Andrews, the first vice-president of the Southern Railroad, general political manager of the same for North Carolina, of a certain piece of hotel property known as Round Knob, situated on the line of the said railroad; the said hotel property is worth little or nothing except as a hotel, and that it is worthless for this purpose except when designated and patronized by the Southern Railroad as an eating-house for their passenger trains; that said hotel property has been unoccupied and unused for any purpose for several years past and has brought in no revenue to you as one of its owners; that it is impossible for you to use, rent or lease said property unless some understanding, agreement or contract could be made with the Southern Railroad Company to designate and patronize the said hotel as a railroad eating-house; that you and the other owner or owners of said hotel property have secured some agreement, understanding or contract from the Southern Railroad Company to abandon other eating-houses and designate Round Knob as an eating-house; and that by virtue of said arrangements with said railroad that you have been able to lease said hotel property to S. Otho Wilson, or to his mother through the said Wilson, for profit.

It is further alleged that you have a son in the employment of the Southern Railroad Company at Morganton; that

he was appointed to this place by the Southern Railroad Company at your request, and that he was appointed over others entitled to the place by promotion under the practice of the company, and that this was done for your accommodation and at your request.

These allegations have been made to me by many persons, and I think publication of them has been made in the public press If they or the material substance of them be true —as to which I am expressing no opinion—then the questions to be determined are as follows:

First. Have you acquired any interest in any way in such company in violation of law?

Second. Have you become disqualified to act as a fair judge or commissioner?

Under the law the Governor has not only a right but is required to suspend a railroad commissioner who commits a breach of the statute, which has been cited, and this he may do, as in other cases of executive removals, without notice to the party interested; but I shall not pass judgment or decide this matter until you have had a full opportunity to be heard by way of denial or explanation or justification or other defense. You will therefore please show cause in writing on or before Wednesday, the 1st day of September, 1897, at the Executive office in Raleigh, why you should not be suspended from your said office and a report thereof be made to the next General Assembly according to law. On the return day of this notice, you will please make answer and proofs in writing, and be there in person or by counsel at your election.

DANIEL L. RUSSELL,
Governor.

To which said James W. Wilson made reply as follows:

"AUGUST 30TH, 1897.

TO DANIEL L. RUSSELL,
Governor of North Carolina:

SIR: Your favor of the 25th, citing me to appear before you on Wednesday, the 1st day of September, and reply in writing to certain rumors or charges from parties unknown to me, and show cause why I should not be removed from the responsible position of chairman of the railroad commission, agreeable to section 1 of the act creating this commission, was duly received.

In obedience thereto I herewith submit this, my answer to each charge in the order as given in your letter. It is drawn by myself and possibly free from the elegant diction which a lawyer would have imparted, but I feel sure it will carry conviction to an impartial mind.

1st. It is not true, as alleged, that I am the joint owner with Col. A. B. Andrews, vice-president of the Southern Railway and general political manager of the same for North Carolina, in a certain piece of hotel property known as Round Knob.

2nd. It is not true that said hotel property is worthless for that purpose except when designated and patronized by the Southern Railway Company as an eating-house for their passenger trains.

3rd. It is not true that said hotel property has been unoccupied and unused for any purpose for several years past and brought in no revenue to me as one of its owners.

4th. It is not true that it was impossible to use, lease or rent said property unless some understanding, agreement or contract could be made with the Southern Railway to designate and patronize the said hotel as a railroad eating-house.

5th. It is not true, as alleged that I with the other owner or owners of said property have secured an agreement, understanding or contract from the Southern Railway Company to abandon other eating-houses and designate Round Knob as an eating-house, and by virtue of said agreements

with said railroad that I have been able to lease said hotel property to Otho Wilson, or his mother, through the said Wilson, for profit.

6th. It is untrue, as further alleged, that I have a son in the employment of the Southern Railway Company at my request and that he was appointed over others entitled to the place by promotion under the practice of the company, and this was done for my accommodation and at my request. I hereby denounce these allegations as made to you by many persons as false, and demand the proof.

In explanation I will say that about 1881 Col. Andrews and myself built this hotel at a cost of about $8,000. It is not worthless, as stated, but is a most convenient and beautiful hotel, with thirty rooms, closets and baths on each floor, and was leased and run as a hotel for several years with no meals supplied to passengers. The property has not been unoccupied for years, as charged, but on the contrary was leased up to last year, at an annual rental of $500 per annum, to a responsible party, with no understanding of any kind with the Southern Railway Company.

In a casual conversation with Mr. Otho Wilson, my recollection is that I spoke of this very desirable property, which was then vacant, the lease of Friscard & Co. having expired, and saying that the superintendent of the road had sent me word that if some one would open and keep a good house he would make it a dinner house; the hotel at Hickory was then closed, and my impression is that Asheville was not then a regular eating-house, but of this I am not sure. Mr. Wilson remarked that his mother was looking around for a boarding-house, and that possibly this might suit her, and he would go up and examine the property. This he did, and on his return expressed himself as greatly pleased, but said the former lessee had left the property in bad condition and very dirty. I was aware of this, and replied that, on this account, if his mother would put the place in good repair she could have it the first year free of rent—this much

for the profit as charged; the message to me about the eating-house was not intended for Mr. Otho Wilson or his mother, but was sent before Mr. Wilson or his mother ever thought of it, or intended for any person I could get who would keep a first-class table. The management of the property was left entirely to me, and my recollection is that I never mentioned the matter to Col. Andrews until the trade was consummated through Mr. Otho Wilson for his mother.

The land upon which the Round Knob property was located belonged to John Malone, Col. Crockford and myself. This party owed a debt of about $3,000 to R. H. Brown, of McDowell County. I am the only one of the parties now living, and was alone responsible for the debt. For the hotel itself I paid $6,000, Col. Andrews $3,000, Col. Andrews' interest being about one-quarter of the hotel, with about ten acres of land adjoining. Before the receipt of your letter I had no idea that any man in North Carolina seriously considered that my owning a piece of property jointly with Col. Andrews, and held jointly by us since 1881, and now rented by a widow, which being in addition to a summer resort was a dinner station for the passenger trains of the Southern Railway, would ever in any way be so construed as to make me in any form under obligations to the Southern Railway.

Finding, however, by your letter that there were parties who believed or pretended to believe that this was indirectly a violation of the act, I promptly, under the advice of friends, to avoid "even the appearance of evil," deeded my individual interests in the property to R. H. Brown for his claim of about $3,000 about the value at the present depreciation of the property. This was done agreeably to Section 1 of the Act to avoid any criticism by even the captious as to my conduct as Railroad Commissioner, feeling no uneasiness that your fairness as a judge should be so biased as to decide that with the showing made you could with any pretension of justice, remove me from the office now held by the

unanimous support of the Legislature of North Carolina; for this unprecedented compliment I have never before had an opportunity to return thanks.

As to the charges about my son, I will say that he is no minor, as charged, but is twenty-seven years old, and is one of the oldest employees on the division upon which he is stationed. About seven years ago the agent at Morganton resigned. My son was his chief clerk, and in the very line of promotion. V. E. McBee, general superintendent of the Seaboard Air Line, was at that time superintendent of that division; he had previously promised my son, as was told, that he would promote him at the first opportunity. Mr. McBee kept his promise. I have no recollection of it, but it is more than probable that I spoke to Capt. McBee in his behalf. It would have been a most unnatural father who would have done otherwise. I believe this covers the entire bill of charges.

* * * * * * * *

In addition to the facts, I will say that the State of North Carolina has a constitution which you and I have sworn to support. This constitution and the laws as expounded guarantee protection to its humblest citizen. To a lawyer of your acknowledged ability, it may appear presumptious for me to call to your attention sections 4 and 5, article 6, of the State constitution, which reads as follows:

"The following classes of persons shall be disqualified for offices: First, all persons who shall deny the being of Almighty God; second, all persons who shall have been convicted of treason, perjury or of any infamous crime, etc." See also article 4, section 31. Also article 1, section 19, of Bill of Rights. This I will copy in full, as it is regarded by every freeman as a bulwark of liberty. It reads as follows: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable."

See also the 14th amendment of the constitution of the United States, which forbids any State to deprive a citizen of life, liberty or property without due process of law. See also decisions of our Supreme Court: *Hoke* v. *Henderson*, 4 Devereux; *Cotton* v. *Ellis*, 7 Jones; *Bunting* v. *Gates*, 77 N. C.; *Branson* v. *Turner*, 70 N. C.; *Howerton* v. *Tate*, 70 N. C. Legislature cannot confer on an executive judicial powers. See Cooley on Constitutional Limitations. Act 1891, making railroad commission a court of record."

On September 23, 1897, the Governor addressed to him the following communication:

To JAMES W. WILSON, ESQ,
Chairman Railroad Commission.

SIR: Take notice that after due investigation and consideration I am convinced that you have violated the Railroad Commission law in some of the particulars mentioned in my letter to you August 24th, 1897, and that you have not only violated said Act in the specification set out in said Act, but that you have otherwise, within the meaning and intent and words of said Act become disqualified to act.

Now, therefore, in obedience to the duty imposed upon me by said Act of the Assembly, I do hereby suspend you from the office of Railroad Commissioner and Chairman of said Commission, such suspension to continue until the question of your removal or restoration shall be determined by a majority of the General Assembly in joint session. The fact of your suspension together with the reasons therefor and the evidence, documents and information connected therewith will be reported to the next General Assembly.

You will further take notice that under and by virtue of the powers conferred and duties imposed by law upon the Chief Executive, I have appointed L. C. Caldwell, Esq., of the County of Iredell, to fill the vacancy created by your suspension.

Inasmuch as you are understood to deny the power of

the Executive to suspend you from office as provided by the Statutes, I have requested Mr. Caldwell to make demand upon you for the possession of the office and upon your refusal, to bring action therefor to the end that the title to the office may be judicially determined.

(Signed) D. L. RUSSELL,
Governor.

The plaintiff in error declined to surrender his office, and this action was brought on the 5th day of October, 1897, to try the title thereto.

The defendant in his answer, among his various matters of defence, denied generally and specifically the matters alleged against him; alleged that before suspension he had disposed of his interest in the Round Knob property, as he was entitled to do under the statute; and denied that he had anything to do with the employment of his son as agent at Morganton. He further alleged:

27. That the Board of Railroad Commissioners is a Court of Record and the Commissioners are Judges under and by virtue of Article 4, Section 12, of the Constitution of the State by which it is provided, "The General Assembly shall have no power to deprive the Judicial Department of any power or jurisdiction which rightfully pertains to it as a co ordinate department of the Government, but the General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court among the other courts prescribed in this Constitution or which may be established by law in such manner as it may deem best, provide also a proper system of appeals, and regulate by law when necessary the method of proceeding in the exercise of their powers, of all courts below the Supreme Court so far as the same may be done without conflict with other provisions of this Constitution."

28. That by Article 4, Section 30, of the State Constitution it is further provided, "In case the General Assembly shall

establish other courts inferior to the Supreme Court the presiding officers and clerks thereof shall be elected in such manner as the General Assembly may from time to time prescribe, and they shall hold their offices for a term not exceeding eight years."

29. That by Article 4, Section 31, of the State Constitution it is further provided, "Any judge of the Supreme Court or of the Superior Court and the presiding officers of such courts inferior to the Supreme Court as may be established by law may be removed from office for mental or physical inability upon a concurrent resolution of two-thirds of both houses of the General Assembly. The judge or presiding officer against whom the General Assembly may be about to proceed shall receive notice thereof accompanied by a copy of the causes alleged for his removal at least twenty days before the day on which either house of the General Assembly shall act thereon."

30. That the alleged causes of removal set up by the Governor are such as apply to no other judges or presiding officers of courts or any other public officers in the State, and the Governor has no power to remove or suspend any other judge or presiding officer of courts or any other officer not appointed by him. Wherefore the defendant says the Statute and the said action of the Governor deprive him of the equal protection of the laws and are in violation of the Fourteenth Amendment of the Constitution of the United States, and this defendant expressly claims the protection of said Amendment.

31. That, as appears by section 3 of the complaint, the Governor cited this defendant before him to answer the charges preferred against him. This defendant fully answered, and generally and specifically denied the charges. Thereupon the defendant demanded to be confronted with his accusers and to hear and cross-examine the witnesses against him. This was refused and no witness or other evidence was produced; and thereafter the Governor made his decision, by

which he attempted to remove the defendant till the meeting of the General Assembly, early in January, 1899. The defendant submits that this action was without a hearing and without evidence to support it, without any trial and without any right of appeal. Wherefore he says the said action deprives him of his liberty and property without due process of law, and is in direct conflict with the Fourteenth Amendment to the Constitution of the United States, and the defendant expressly claims the protection of said Amendment.

On the trial in the Superior Court the plaintiff in error (defendant below) tendered the following issues and demanded a trial by the jury:

1. Is the plaintiff entitled to the office of Railroad Commissioner?

2. Does the defendant unlawfully intrude into, hold and exercise the office of Railroad Commissioner and Chairman of said Commission?

3. Has the defendant acquired any interest in any way in the Southern Railway Company in violation of law?

4. Has the defendant become disqualified to act as a fair Judge or Commissioner, or has he become in any way disqualified to act?

5. Did the defendant prior to September 1, 1897, sell and convey for a valuable consideration the Round Knob Hotel to R. M. Brown?

6. Did the defendant demand of the Governor that the evidence against him be produced and that he have an opportunity to confront his accusers and cross-examine the witnesses against him?

7. Was said demand refused?

8. Was any evidence produced?

The Court refused to submit the issues to the jury and the defendant excepted.

The Court ruled that the plaintiff below was entitled to judgment upon the pleadings. This ruling was sustained

by the Supreme Court of the State. The plaintiff in error filed the following

ASSIGNMENT OF ERRORS:

First. That the Supreme Court erred in holding that the defendant was not removed or suspended from his office of Railroad Commissioner without due process of law and contrary to the Fourteenth Amendment to the Constitution of the United States.

Second. That the Supreme Court erred in holding that in the removal or suspension of the defendant he was not deprived of the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States.

Third. That it appears by the record in this case that the Governor made certain charges against the defendant in his letter of August 24th, 1897, and cited him to appear before him on the first day of September, 1897, and show cause in writing, and to make answer and proofs in writing, and to be there in person or by counsel at his election; that the defendant appeared and filed a written denial of all the charges, and demanded to be confronted with his accusers and to hear and cross-examine the witnesses against him; that said demand was refused; that the facts were not in the personal knowledge of the Governor; and that the Governor without evidence and without a trial undertook to find generally that the defendant had violated the Railroad Commission law in some of the particulars mentioned in his letter of August 24th, 1897, set out in the complaint, and that the defendant had not only violated the said act in the specifications set out in the said act, but that he had otherwise within the intent and meaning and words of said act become disqualified to act; and thereupon the Governor undertook to suspend or remove the defendant and deprive him of his office, and appointed the relator, L. C. Caldwell, to fill the same;

that defendant declined to surrender his office, and thereupon this action in the nature of *quo warranto* was brought to oust him therefrom; that in the Superior Court the defendant filed his answer, controverting all the charges made against him and tendered issues covering all phases of the controversy; that the trial Court refused to submit the issues or any issues to the jury, but ruled that the statute and the action of the Governor did not deprive the defendant of his liberties and property without due process of law, and that the plaintiff was entitled to judgment for the possession of the office on the pleadings; that the defendant duly excepted and appealed to the Supreme Court, and the ruling and decision of the trial Court was sustained, and the judgment affirmed.

The defendant says said ruling and decision is erroneous and in violation of the Fourteenth Amendment to the Constitution of the United States.

Fourth. That the defendant is a judge of a court of record under the laws of North Carolina, and no judge or other officer is liable to removal or suspension by the Governor. Moreover the Constitution of North Carolina, Art. 4, Sec. 30, confers the power of removal of judges on the General Assembly for mental and physical inability which this defendant claims is a prohibition against removal by the Governor or Legislature for other causes. The Supreme Court holds that by the action of the Governor the defendant is not deprived of the equal protection of the laws; and the defendant says that the said ruling and decision are erroneous and in violation of the Fourteeth Amendment to the Constitution of the United States.

The facts in No. 559 present but little difference, except that plaintiff in error, S. Otho Wilson, is charged with renting the Round Knob Hotel, &c., which he squarely denied. His term of office expires April 1, 1901.

The Railroad Commission Act, L. 1891, ch. 320, sec. 1, provides:

"That there shall be three Commissioners elected by the General Assembly to carry out the provisions of this act. * * * * Said Commissioners shall not jointly, or severally, or in any way, be the holder of any stock or bond, or be the agent or attorney or employee of any such company, or have any interest in any way in such company, and shall so continue during the term of his office, and in case any Commissioner shall as distributee or legatee, or in any other way, have or become entitled to any stock or bonds or interest therein of any such company he shall at once dispose of the same; and in case any Commissioner shall fail in this, or in case any one of them shall become disqualified to act, then it shall be the duty of the Governor to suspend him from office, and to report the fact of his suspension, together with the reason therefor, to the next General Assembly, and the question of his removal from office shall be determined by a majority of the General Assembly in joint session. In any case of suspension the Governor shall fill the vacancy, and if the General Assembly shall determine that the Commissioner suspended shall be removed, then the appointee of the Governor shall hold until his successor is elected and qualified as hereinbefore provided, but if the General Assembly shall determine that the suspended Commissioner shall not be removed from his office, then the effect shall be to reinstate him in said office. The person discharging the duties of said office shall be entitled to a salary for the time he is so engaged, but a Commissioner who is suspended shall be allowed the salary during his suspension in case he should be reinstated by the next General Assembly."

ARGUMENT.

I submit that this is not a proper case to dispose of in this summary way.

I.

The motion to dismiss cannot be sustained, because the jurisdiction of the Court is clear and undoubted. *Foster* v. *Kansas*, 112 U. S., 201; *Kennard* v. *Louisiana*, 92 U. S., 480.

II.

The motion to affirm is not allowed unless there is at least some colorable right to dismiss. *Davies* v. *Corbin*, 113 U. S, 687; *Whitney* v. *Cook*, 99 U. S., 607.

This rule is departed from sometimes, where the question has been well settled by other decisions of this Court, or if the reasons for taking the writ of error are frivolous, or if it was taken for delay only. *Foster* v. *Kansas, supra; City of Chanute* v. *Frader*, 132 U. S., 210 (33 L. Ed., 345).

It becomes necessary for me, therefore, to discuss fully the merits of the case.

III.

The statute and the action of the Governor violate the Fourteenth Amendment to the Constitution of the United States, in that they (one or both) deprive the plaintiff in error of his liberty (or privileges) and property without due process of law.

We say that the proceedings before the Governor lacked the essentials of due process of law in the following particulars:

1. Charges were made by the Governor, not upon his own knowledge, but on information and newspaper reports. These were specifically denied. The Governor could not pass upon

them without evidence. He declined to produce any evidence, and the answer, which must be taken as true for the purpose of this hearing, squarely alleges that he acted without evidence. The defendant asked an opportunity to try this question, and tendered issues upon it.

2. There was no opportunity allowed the defendant to confront his accusers or to cross-examine the witnesses.

3. There was no finding of any specific fact by the Governor. He says that defendant is guilty of some of the charges made in his letter and in other particulars within the words and intent and meaning of the act has become disqualified to act. So that the defendant cannot yet know for what he is condemned.

4. The defendant has never been tried according to the law of the land.

5. He had no opportunity of appeal.

6. The Governor is not a court, and therefore the whole proceeding was without authority. Under the Constitution of the State, he had no jurisdiction, and therefore the statute in this respect and his action are void.

7. That the method was not consistent with the accusatorial methods required by the genius and spirit of our law, in that the Governor revealed no accuser, and therefore necessarily was himself accuser and judge.

The solution of this question of due process depends on whether the method of procedure was in substantial accord with the law and usage in England before the Declaration of Independence and in this country since it became a nation, in similar cases.

Lowe v. Kansas, 163 U. S., 81.

"There is nothing," says Judge Cooley, "technical, or, we think, obscure, in the requirement that process which divests property shall be due process of law. The Constitution makes no attempt to define such process, but assumes that custom and law have already settled what it is. Even in

judicial proceedings we do not ascertain from the Constitution what is lawful process, but we test their action by principles which were before the Constitution, and the benefit of which we assume that the Constitution was intended to perpetuate. If there existed, before that instrument was adopted, well known administrative proceedings which having their origin in a legislative conviction of their necessity, had been sanctioned by long and general acceptance, we are no more at liberty to infer an intent in the people to prohibit them by implication from any general language, than we should be to infer an intent to abridge the judicial authority by the use of similar words. The truth is, the bills of rights in the American Constitutions have not been drafted for the introduction of new law to secure old principles against abrogation or violation. They are conservatory instruments rather than reformatory, and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation."

Weimer v. Bunbry, 30 Mich., 201, 213.

Many cases might be cited to show the practice in England. A number of them are collected in *Dullam* v. *Wilson*, *infra*.

In *King* v. *Gaskin*, 8 Term. Rep., 208, a parish clerk removed by the rector was restored by *mandamus* because it did not appear that he had been summoned to answer before he was removed. Said Lord Kenyon, Ch. J.: "If we were to hold this return to be sufficient we should decide contrary to one of the first principles of justice, *audi alteram partem*. * * * It is to be found at the head of our criminal law that every man ought to be heard before he is condemned; and I should tremble at giving way to this principle." Such was one of the grounds in *Bagg's case*, 11 Coke, 99.

In *King* v. *Free Fishermen of Faversham*, 8 T. R., 352, the return to the *mandamus* was quashed and the prosecutor re-

stored because it appeared that the charges were not proved. See also, *Ex parte Ramshay*, 18 Q. B., 173, 189, where Lord Campbell states the different things that will vitiate the removal—among others: "The Chancellor has authority to remove a judge of a county court only on the implied condition prescribed by the principles of eternal justice that he hears the party accused; *he cannot legally act upon such an occasion without some evidence being adduced to support the charges.*"

In *Kennard* v. *Louisiana*, 92 U. S., 480, which was a question as to the removal of a judicial officer, the Court said: "It is substantially admitted by counsel in the argument that such is not the case (*i. e.*, the officer was not removed without due process), if it has been done 'in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights' We accept this as a sufficient definition of the term 'due process of law' for the purposes of the present case. The question before us is, not whether the Courts below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the Constitution."

There the officer had a regular trial in a court of competent jurisdiction, with an appeal to the Supreme Court. "He had an opportunity to be heard before he could be condemned." "The remedy provided was certainly speedy; but it could only be enforced *by means of orderly proceedings in a court of competent jurisdiction in accordance with rules and forms established for the protection of the rights of the parties.*" This was held due process of law. But it is difficult to believe that it would have been so held had the Judge in that case been denied a day in court—a trial and an appeal.

"In *Davidson* v. *New Orleans* it was said that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person

should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the Fourteenth Amendment. * * * Such an enactment would not receive judicial sanction in any country having a written Constitution distributing the powers of government among three co-ordinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such constitution. It would be treated not as an exertion of legislative power, but as *a sentence—an act of spoliation.*"

Chicago, Burlington and Quincy Rail road *v.* Chicago, 166 U. S., 226, 235.

The same principle applies if the sentence comes from an executive officer. He has no more right to deprive one of his property than the Legislature.

"But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislature, executive and judicial authorities, and, therefore, whoever, by virtue of public position under a State government, deprives another of any right protected by the amendment against deprivation of the State, 'violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the State has clothed one of its agents with power to annul or evade it.'"

Chicago, &c., R. *v.* Chicago, 166 U. S., 233, 234.

"No judgment of a Court is due process of law, if rendered without jurisdiction in the Court, or without notice to the party.

"The words 'due process of law,' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this Court, 'mean a course of legal proceedings according to

those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit.'"

Scott *v.* McNeal, 154 U. S., 34, 46.

A thorough discussion of the whole question can be found in *Dullam* v. *Willson*, 51 Amer. Rep, 128 In that case the Governor being expressly empowered by the Constitution removed a trustee of the Michigan Institution for Educating the Deaf and Dumb for "official misconduct and habitual neglect of duty." No notice was given to the defendant Willson before his removal. In the notification of removal the Governor stated to defendant that he had removed defendant for his "official misconduct and habitual neglect of duty," and that he would lay before the Legislature the reasons for such removal at its next session in detail. The Governor appointed Dullam trustee to fill the vacancy occasioned by such removal, and Willson declining to surrender his office, an information in the nature of *quo warranto* was brought by Dullam to test the title to the office.

The Michigan Constitution expressly granted to the Governor the right of removal. So that the case is a very important one as to the method of exercising the power, where it is conferred. It is the more important because Mr. Cooley was then Chief Justice of the Court Said Champlain, J., in delivering the leading opinion: "Unless it is the manifest intention of the section under consideration that the proceedings shall be *ex parte* as well as summary, a removal without charges, notice and an opportunity for defence cannot be upheld. The exercise of such a power, in such manner, would be too despotic for any attempt at vindication in a country which boasts of the utmost liberty compatible with the safety of the State, and is entirely opposed to the genius of our free

institutions. I do not think the people, when they adopted this amendment, intended or supposed that they were placing such unlimited power in the hands of any man. If it exists, it places it in the power of the Governor, at his mere will or caprice, to remove all State officers, except legislative and judicial; and to fill their places with his own partisans, thus revolutionizing the whole administration of the State, and defeating the express will of the people who elected him. It is no argument to say it may never be done. It is sufficient to know that it could be done, and that the people in adopting the amendment never intended to grant the power by which it might be done.

"The history of judicial proceedings shows that it has been frequently the case that officers, invested with the power of removal for specified cause, have attempted its exercise in an *ex parte* and summary manner, not through any wrong motive, but from a misconception of the method in which such power should be exercised." Then are cited divers cases, in which the right to a hearing is discussed.

"There must be charges specifying the particulars in which the officer is subject to removal. It is not sufficient to follow the language of the Constitution." *Ib.*, p. 139.

Again, he speaks of the cases relied on to show that no notice was required, and that the action of the executive was final and conclusive, and says, "they appear to him to be opposed not only to the decided weight of authority, but also to the fundamental principles of justice."

Campbell, J., also filed an able opinion, in whichhe denies the power of the Governor to remove, even under the Michigan constitution, until the ground of removal is established by a trial by jury or by impeachment.

In speaking of the contention that the action of the Governor must be respected as the act of an independent co-ordinate department of the government, subject to an appeal and that it was not within the power of the judiciary to review or sit in judgment upon the action of the executive, he says:

"It is undoubtedly true that no Court can review the lawful discretion of anybody that is not a Court, and that the executive stands in this respect on the same footing with all other persons and bodies. But it is equally true that private rights cannot be subjected by legislative, executive, or any other authority, to the unregulated discretion of any one. Legal rights can only be divested by such measures as are classed under the law of the land as due process of law. Courts, in determining whether vested rights have ceased to exist, do not act necessarily or usually as appellate tribunals, whose judgments operate on the tribunals or persons whose invasions of right are complained of. They may or may not do so. But, in a constitutional government, the action of all persons, officials or private, which is in violation of Constitutional rights, is simply null and void, and usually needs no reversal. And the action of any department of government, whether legislative, executive or judicial, beyond its jurisdiction, or against the constitutional limitations of its authority, is in law the same as if there had been no action, and cannot be recognized as having legal effect * * * No executive authority exists outside of its legal boundaries. All officers must be created in accordance with law. Unless they are held during the pleasure of the executive, or subject to removal at his will, he cannot interfere with them, except as the law provides; AND, IF HIS RIGHT DEPENDS ON CONDITIONS, those conditions must be determined in some legal way. No right can be subject to his uncontrolled discretion.

"And where, as is sometimes the case, he has the duty of inquiry and decision, he has no power to decide without a hearing any controversy involving private rights. We are bound in this case to ascertain whether he has acted in accordance with any authority lawfully vested in him, and decide accordingly." *Ib.*, 141, 142.

"And it has been uniformly held by this Court that where provision has been made—as under the Constitution it may be for removal of local officers for cause by other bodies—

there must be the same definite charges and fair hearing whether expressly required by statute or not." *Ibid*, 142.

"If the Governor can, as claimed by relator, pass in person upon charges against State officers for malversation in office without a conviction elsewhere, under the provisions of the Constitution or of this statute, inasmuch as he is only allowed to do it for causes specified, his action is as distinctively judicial as that of the other removing bodies; and it must appear in its face to be for definite causes determined upon a legal showing after a due hearing. A judgment is void which does not show on its face that the judicial body rendering it had both jurisdiction over the person and jurisdiction upon legal charges.

"That removals for cause are judicial acts, and that they must be disregarded whether appealable or not, if not conforming to jurisdictional requisites, has been settled so long, not only in this State, but by the common law doctrines and by the general agreement of Courts, that there is no room for serious controversy." *Ib.*, 143.

After speaking of removals in England, where "Parliament has power to vest any class of powers anywhere it pleases," he proceeds: "In most of these cases there is no appellate jurisdiction anywhere. But in every case of removal for cause the Courts of law have exercised the right of passing upon the legality of the removal, and have invariably treated it as void unless exercised conformably to the requirements of jurisdictional sufficiency. And whenever a party unlawfully removed has been actually shut out by his associates or others from acting, a *mandamus* has issued to restore him, and has been made peremptory unless the proceeding of removal *contained affirmative evidence of sufficient charges sustained on a proper hearing.*

"It has always been held that general conclusions or conclusions on general charges were not enough, but the facts on which the judgment was based must appear either in specific charges or in specific findings, on which the party has been *heard on legal proofs*," (citing many English cases).

"These cases not only require a proper hearing on proper charges, but hold that those charges must consist of distinctly stated facts, and not general charges of wrong or neglect, so that it can be determined, as a matter of law, whether what the removing body treats as wrong is within the legal quality of wrong. * * * * * *

It is also held that the case must appear to have been proved by evidence, and that a mere finding of results on alleged personal knowledge is not enough." *Ib.*, 144.

"This is not merely antient doctrine. The safeguards against wrong and the right to have charges determined by due process of law, which is distinctly asserted by Lord Mansfield in Burrows, as the basis of these rulings, are as clearly recognized under the grant of special remedies as in any other." *Ib.*, 145.

"The fact, then, that the statute and the Constitution, in giving the Governor power to remove, prescribe no methods of examination, can in no way relieve him from the necessity—even if he is to pass personally on the facts—of having specific charges of misconduct communicated to the officer, and established by proof, with a full opportunity to the respondent to examine and cross-examine witnesses, and be heard on the facts and the law."

Ib., 145.

See People *v.* Therrien, 80 Mich., 187, which reaffirms this case in an able opinion; also Field *v.* Com., 32 Pa. St., 352.

The Governor cannot proceed without evidence, unless the matter is within his own knowledge or discretion.

Throop on Pub. Officers, 345, 346, 362–365.

Mechem on Pub. Officers, secs. 454, 455.

1 Dillon Mun. Corp., secs. 250, 255.

High Ex. Legal Rem., 68, 69.

Dullam *v.* Willson, 53 Mich., 392 (51 Amer. Rep., 128).

Hallgren *v.* Campbell, 82 Mich., 255 (21 Amer. St. Rep., 557).
People *v.* Stuart, 74 Mich., 411 (16 Amer. St. Rep., 644).
People *v.* Nichols, 79 N. Y., 582.
People *v.* Campbell, 82 N. Y., 247.
People *v.* Brooklyn, 103 N. Y., 370.
People *v.* Brooklyn, 106 N. Y., 64.
Lease *v.* Freeborn, 35 Pac., 817.

The rule is clearly stated by Dillon, *supra:* "Where an officer is *appointed during pleasure*, or where *the power* of removal *is discretionary*, the power to remove may be exercised *without notice or hearing*. But when the appointment is *during good behavior*, or when the removal can only be for certain *specified causes*, the power of removal cannot, as will presently be shown, be exercised, unless there be a charge against the officer, *notice* to him of the accusation, and a *hearing of the evidence in support of the charges*, and an opportunity given to the party to make defence."

Sec. 250.

"There must be a *charge*, or charges, against him, *specifically stated*, with substantial certainty; yet the technical nicety required in indictments is not necessary. And *reasonable time and opportunity* must be given to answer the charges and to produce his testimony; and he is also entitled to be heard and defended by counsel, and *to cross-examine the witnesses, and to except to the proofs against him. If the charge be not not denied, still it must, if not admitted, be examined and proved.*"

Ibid., sec. 255.

Right along the line of this contention is the careful and exhaustive discussion in *Hovey* v. *Elliott*, 167 U. S., 409. Bearing in mind that the Governor is not a court; that he himself declared that he had no power to subpœna wit-

nesses; that upon an allegation and a denial, the facts not being within his personal knowledge, and his action being based on letters of others and newspaper reports, he declined to produce any evidence, but acted without evidence and therefore necessarily without opportunity for consideration, we must recognize the striking pertinency of these extracts from that opinion. The defendent in the original case was notified—summoned—as here; but his answer was stricken out for contempt; and the question was "whether a court possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party to answer or strike his answer from the files, *suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing*, on the theory that he has been guilty of contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

"In *McVeigh* v. *United States*, 11 Wall., 259, the Court, through Mr. Justice Swayne, said (p. 267):

'In our judgment the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. * * * The liability and the right are inseparable. A different re-

sult would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice.'

"And quoting with approval this language in *Windsor* v. *McVeigh*, 93 U. S., 274, the Court, speaking through Mr. Justice Field, again said (pp. 277, 278):

'The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the Court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim of the charges made; it is a summons to him to appear and speak, if he has any thing to say, why the judgment sought should not be rendered. *A denial to the party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and defective proceeding had better be omitted altogether. It would be like saying to a party, appear and you shall be heard; and, when he has appeared, saying, your appearance shall not be recognized, and you shall not be heard.* In the present case, the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a de-

cree thus rendered with moderation; it was, in fact, a *mere arbitrary edict, clothed in the form of a judicial sentence.*" 167 U. S., 413–415.

The Court then, through Mr. Justice White, cites many English cases, closely in the line of my contention; and also Story's declaration that the due process clause "in effect affirms the right of trial according to the process and proceedings of the common law." (p. 417.)

So on p. 418: "In *Galpin* v. *Page*, 18 Wall, 350, the Court said (p. 368): 'It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his say in court, by which is meant, until he has been duly cited to appear, *and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered.' And it quotes from Judge Cooley: 'The definition here given (Mr. Webster's) is apt and suitable as applied to judicial proceedings, which cannot be valid unless they '*proceed upon inquiry*' and 'render judgment only after trial.'" P. 418.

Again (p. 445): "Looking at the substance and not the form of the decree in the case of *Hovey* v. *McDonald*, upon which the rights of the plaintiff in error depend, it is plain that the judgment was substantially one without a hearing, for of what efficacy or avail was the summons to appear when the court which issued the summons rendered its judgment upon the theory that the summons was inefficacious, and that the defendant had no right either to appear or to be heard in his defence? As was said by this Court in *Adams* v. *Postal Telegraph Cable Co.*, 155 U. S., 689, 698: 'The substance and not the shadow determines the validity of the exercise of the power.'"

"There is no distinction in principle between determining a cause upon issues not raised by the pleadings in the actual absence of the party, and rendering a decree by refusing to

permit a defendant to be heard in his defence or to consider the merits of a sufficient defence, and, indeed, by striking the pleading containing such defence from the files."

So in *Chicago &c. Railroad* v. *Chicago*, 166 U. S., 226, it is said (p. 234-235): "Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defence..... But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of th tatute prescribing forms of procedure in the courts, and giv ıe parties interested the fullest opportunity to be heard, a yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law regard must be had to substance not to form."

Of what avail is notice if the Governor may assume the truth of a matter of which he is totally ignorant, and ignore all denials—decline to produce evidence—decline to reveal the accuser—decline to allow him to be cross-examined—ignore every pretence of hearing the proofs, and yet suspend?

The Governor must make specific charges and find on them. He cannot suspend for other causes than those assigned. The power to suspend is special, and must be strictly pursued.

Throop on Pub. Officers, sections 362, 379, 383, 385.
Dullam *v.* Willson, *supra.*
Wellman *v.* Board Met. Police, 84 Mich., 558.
People *v.* Therrien, 80 Mich., 187.
State *ex rel.* Dennison *v.* St. Louis, 90 Mo., 187.
State *v.* Duluth, 53 Minn., 238 (39 Amer. St. Rep., 595.)
Field *v.* Com., 32 Pa. St., 478; Mechem Pub. Off., 450–453.

The Governor has no right to order an investigation except upon specific charges; nor can he remove after such investigation, unless upon such a showing and record of the proceedings as will show to the world and to the accused for what particular act or acts of misconduct he has forfeited his office and been removed therefrom.

People *v.* Therrien, 80 Mich., 187, 190.

There is no specific finding of facts from which the defendant may know of what he is convicted.

For example, J. W. Wilson cannot know whether he is beheaded because of the Round Knob hotel matter, or because of his son's being employed as railroad agent "for his accommodation," or for some other "disqualification." The importance of a specific finding is apparent, when we consider that the son was appointed in 1891 and J. W. Wilson was elected in 1893. There seems to be no dissent in the courts from the proposition that an officer cannot be removed or suspended for reasons existing at the time of his election.

Doyle *v.* Raleigh, 89 N. C., 133.

Ellison *v.* Raleigh, 89 N. C., 125.

Speed *v.* Detroit, 98 Mich., 360 (39 Amer. St. Rep., 555).

Rex *v.* Mayor, etc., of Doncaster, Sayers, 37.

Again: Maj. Wilson acquired the hotel property in 1891. Is he suspended for that? or for having a joint interest with Col. Andrews? or for renting it out? or for having some arrangement or understanding with the Southern Road that they will stop and take meals at the table of the lessee? It is not for all of the things specified because it is only found that *some of them are true.*

Again, the Governor, in his letter to Maj. Wilson, summarizes the matter as follows:

"If they or the material substance of them be true—as to which I am expressing no opinion—then the questions to be determined are as follows:

"First. Have you acquired any interest in any way in such company in violation of law?

"Second. Have you become disqualified to act as a fair judge or commissioner?"

There is no finding by the Governor which enables us to know of which charge he convicts.

The Governor may be reviewed.

Mechem on Pub. Officers, secs. 450–452, 456.
People *v.* French, 110 N. Y., 494.
Evans *v.* Populus, 22 La. An., 121.
19 Am. & En. Enc., 562 p.*

This is necessarily so, inasmuch as he must proceed for cause, and not as matter of discretion. If the cause does not exist, he has no jurisdiction.

People *v.* Therrien, 80 Mich., 187.

Said Lord Mansfield, in *Rex* v. *Warren*, Clerk: "Though the minister may have a power of removing him on a good and sufficient cause, he can never be the sole judge and remove him *ad libitum*, without being subject to the control of this Court."

1 Cowp., 370.

"To the proposition that removing boards perform acts which are judicial in their nature, we readily assent. They must hear and determine, when the power is limited to removals for cause. So must boards of review, auditing boards, highway and drain officers, pardon boards, and in fact nearly every officer who has duties to perform; and it is also true that the action of all of these is subject to review in courts of justice." *Fuller* v. *Attorney General*, 98 Mich., 104.

Lastly,

"The public accusatorial trial is another element of the independence of the law, as it is one of the efficient protections of the citizen."

Lieber Civil Liberty and Self-Government, 216.

"We consider that the accusatorial procedure, carried out with consistency and good faith, requires that the accusation itself be not made by the executive, but upon information, by whomsoever made, through an act which itself includes a guarantee against frivolous or oppressive accusation."

Ib., 219

"On the other hand the Judge should remain, during the trial, mere Judge, and never become inquirer or part of the prosecution."

Ib., 220.

IV.

The opinion of the Court below is unsound in many of the arguments on which it is based.

To cite a few of them:

1. It makes the case of *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How., 272, the leading authority for its position on the subject of due process of law. But it is elementary learning that the doctrine of that case is exceptional—pertains to the revenue only, and is the law because such was the law in England in the Exchequer, in matters of debt due the crown. The proceeding was due process there, and so it is due process here. I have already shown how different was the practice in England in matters of office. "Imperative necessity has forced a distinction between *such claims* (matters of revenue) and *all others*, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties; but always in some way observed and yielded to."

Murray *v.* Hoboken, *supra.*

The underlying principle strongly supports my theory. The history of the law made the proceedings due process there. The history of the law prevents the proceeding from being due process here.

"We are bound," says Mr. Justice Brown, delivering the opinion of the Court in *Mattox* v. *United States*, 156 U. S., 243, "to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guarantees of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions in the nature of a Bill of Rights are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit."

2. The opinion seeks to find an authority against my contention in *Ex parte Wall*, 107 U. S., 265. But the difference between the two cases is wide and fundamental. Wall was disbarred by the Court, after the examination of one witness There was evidence for the consideration of the Court. Here an executive officer removes, in the absence of evidence—without evidence, in the face of a denial of the charges.

3. The opinion says that the plaintiff in error has not been denied access to the Courts. That he did not appeal from the action of the Governor nor seek the aid of the Courts, but forcibly retained possession of an office from which he had been rightfully suspended, and forced the defendant in error to seek redress in this action. That the Governor in his notification of suspension, distinctly recognized the right of the plaintiff in error to have its legality tested in the Courts, and made no attempt to dispossess him. That the defendant in error has sought possession only "by the law of the land," as shown by the bringing of this action.

Let us analyze this a little:

(1) No appeal lies from the action of the Governor, because he is not a court, and the Legislature has marked out no body to appeal to. Appeals are of statutory creation.

(2) The Supreme Court itself holds that the action of the Governor is not reviewable. (P. r., page 37.)

(3) The plaintiff in error had "due process" because the Governor recognized his right to have its legality tested in the Courts. So! The plaintiff in error has a right to have the legality of his removal tested in the Courts. But when he is brought before the Court, he is summarily cut off—the Court declines to hear and pass on a single allegation he makes. And this is due process! Such is not the language of the law.

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that in the famous language of the Massachusetts Bill of Rights, 'the government of the commonwealth may be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the

means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Yick Wo. *v.* Hopkins, 118 U. S., 356, 370.

Said Pearson, C. J., in delivering the opinion in *Barnes* v. *Barnes*, 8 Jones (53 N. C.), 366: "Suppose the Legislature should pass a statute that the Governor, in the recess of the General Assembly, shall not embody the militia of the county of Rowan, or shall not embody the militia of the State; or shall not do any act of his office, would the legislative and executive powers of the government be kept separate and distinct from each other? Or suppose the Legislature should pass a statute, that the Supreme Court shall not give judgment and issue execution in the case of *Barnes* v. *Barnes*, or shall not give judgment and issue execution in any actions for debts due on bonds, promissory notes, etc., where in the trial of the case, in the Court below, the intervention of a jury was required, or shall not give judgment and issue executions in any suit or action, founded either on contract or tort, brought before it by appeal from the Superior Court, would the legislative and supreme judicial powers of government be kept separate and distinct? In other words, would not the assertion and exercise of this power on the part of the Legislature destroy the independence of the executive and supreme judicial powers of the government, and subvert the government established by the Constitution, by centering all powers in the legislative department, and making a despotism, instead of a free government where the powers are divided and given to separate departments, each acting in its appropriate sphere, as a check on the other?

"Such, it seems to us, would be the result of the concession of the power assumed by the Legislature in the passage of the statute under consideration.

"The result is not avoided by the fact that the restraint on

the Courts is confined, by the statute, to actions for debts and matters of contracts, and that it is not absolute, but merely until 'otherwise provided by law'—for it is a question of power. If the Legislature has the power to impose this restraint on the courts until otherwise provided by law, it has the power to do so without the provision to remove the restraint when we have better times and it shall be easier for men to pay their debts; and, if it has the power to impose this restraint on the courts, in respect to matters of contract, it has the power to extend it to matters of *tort*, and then a man who is stronger than I may take my negro or my horse, or drive me out of my house, and the laws of my country will give me no redress, *because the temple of justice is closed. A power to suspend or to abolish the administration of justice cannot exist in a free government. Without law and tribunals to administer it there can be no government; it is anarchy, which is worse than despotism;* and yet the power involved in the passage of the statute necessarily, and by logical deduction, leads to that result.

"If there be such a power in the Legislature, we are, with all our boasted free institutions, infinitely behind the monarchy of England in respect to the protection of our rights of person and rights of property. Blackstone, the learned commentator on the Constitution and laws of England, in Vol. 1st, page 102, says: 'A third subordinate right of every Englishman is that of applying to the courts of justice for the redress of injuries. Since the law of England is the supreme arbiter of every man's life, liberty and property, courts of justice must, at all times, be open to the subject and the law be duly administered therein. The emphatic words of Magna Charta are these: "*Nulli negabimus aut differemus rectum vel justiciam,*" and therefore every subject for injury done to him *in terris, in bonis, vel persona,* by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of the law and have justice and right for the injury done to him, fully without sale, freely without any denial, and speedily without delay.'"

The fundamental vice of the statute under consideration is that the property rights of a railroad commissioner in his office are temporarily placed under the control of the Governor, who is given the power of suspension for cause, which necessarily presupposes an adjudication somewhere of the existence of the cause; and then the Legislature is to act finally; and nowhere in the scheme marked out by the Act is there a mention of the Courts.

The founders of our government looked very carefully to the preservation of the liberty and rights of the people. They were careful to establish a government of checks and balances, and to guard safely against the intrusion of one department upon the domain of the other. Said Chief Justice Ruffin in *Hoke* v. *Henderson*, 4 Dev. (15 N. C.), 1:

"The great and essential differences between governments, as distinguished from one another by their constitutions, consist in the greater or less personal liberty of the citizen, and the greater or less security of private right, against the violence or seizure of those who are the government for the time being. It is true, the whole community may modify the rights which persons can have in things, or at their pleasure abolish them altogether. But when the community allows the right and declares it to exist, that constitution is the freest and best which forbids the government to abolish the right, or which restrains the government from depriving a particular citizen of it. In other words, public liberty requires that private property should be protected even from the government itself.

"The people of all countries who have enjoyed the semblance of freedom, have regarded this and insisted on it as a fundamental principle. Long before the formation of our present Constitution it was asserted by our ancestors on various occasions; and, in one sense of it its vindication produced the revolution. At the beginning of that struggle, while the jealousy of power was strong, and the love of liberty and right was ardent, and the weakness of the individ-

uel citizen against the claims of unrestricted power in the government was consciously felt, the people framed the Constitution of this State, and therein declared that no freeman ought to be taken, imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed, or *deprived* of his life, liberty or *property*, but by the law of the land. (Bill of Rights, sec. 10). By the fourth section it is declared that the legislative, executive and supreme judicial powers of government ought to be forever separate and distinct from each other.

"In absolute governments, whether hereditary or representative, the division of the powers of government is unimportant, because that body in which resides the superior authority can, at will, make it supreme and absorb all other departments. It does not follow, therefore, that because the British Parliament, whose supremacy is acknowledged, decides questions of private right and puts that decision, as it does its other determinations, into the form of a statute, that whatever it does is legislative in its nature. It can adjudicate, and often does substantially adjudicate, when it proposes to enact new laws. That faculty is expressly denied to our legislature, as much as legislation is denied to our judiciary. Whenever an act of the Assembly, therefore, is a decision of titles between individuals, or classes of individuals, although it may in terms purport to be the introduction of a new rule of title, it is essentially a judgment against the old claim of right, which is not a legislative but a judicial function. It may not be easy to distinguish those powers and to define each, so that an act shall be seen at once to be referable to the one or the other. But I think that where a right of property is acknowledged to have been in one person at one time, and is held to cease in him and to exist in another, whatever may be the origin of the new right in the latter, the destruction of the old one in the former is *by sentence*. If the act of 1832 had been confined in its terms to the clerkship of Lincoln, its judicial character would

be obvious. If it had said that Mr. Henderson had forfeited his office, or had conveyed it to Mr. Hoke, or that after forfeiture Mr. Hoke had been duly appointed, or was by that act appointed, or had been elected by the citizens and was approved by the legislature, and therefore the one should go out and the other go in, it would be plainly as respects Mr. Henderson's title, an adjudication against it, although the subsequent investment of the title in Mr. Hoke would be legislative. Is the act the less of the former character because it does not recite an abuse by Henderson, or other cause of forfeiture? Is not such forfeiture assumed in it? For it is impossible, in the nature of things, that Mr. Hoke can be rightfully put in, unless the other be rightfully put out; and Mr. Henderson cannot rightfully be deprived, unless the thing he claims was never property, or has ceased to be so, or unless he has parted from the property he had in it by forfeiture or otherwise. * * * If valid it (the act) compels the Courts to deprive the officers *without further enquiry before a jury* into the fact or legal sufficiency of any cause of forfeiture or removal." See, also,

Wood *v.* Bellamy, 120 N. C., 212.

In *Vann* v. *Pipkin*, 77 N. C., 408, it is said by Bynum, J., delivering the opinion, "Until the office shall be declared vacant by some competent tribunal authorized by law to declare a vacancy, the Sheriff may rightfully hold the office until the end of his term. * * * Nor can such a vacancy be declared until the alleged delinquent shall have had due notice and a day in Court, if in reach of its process. A forfeiture of office and a vacancy can be judicially declared, only after trial and culpability established. The Sheriff has a property in the emoluments of his office, of which he cannot be deprived but by the law of the land.

Const., Art. 1, § 17.
Hoke *v.* Henderson, 4 Dev., 1."

So in *People* v. *Heaton*, 77 N. C., 18, a *quo warranto* was brought and the cause of forfeiture (failure to keep office open on Monday) judicially established.

Again, in *State* v. *Norman*, 82 N. C., 687, it was expressly held that forfeiture of office of Clerk for failure to keep open his office on Monday, can only be enforced by proceedings in the nature of *quo warranto*.

That case is the more striking as an authority, because the defendant had been indicted and convicted, yet the Court held he could not be deprived of his office save by a proceeding in the nature of a *quo warranto*.

If the plaintiff in error had become disqualified to act, it was easy to institute a proceeding in the nature of *quo warranto*, and have him removed.

Code, Sec. 607, (2) expressly provides:

"An action may be brought by the Attorney General in the name of the State, upon his own information, or upon the complaint of any private party, against the parties offending in the following cases:

(2) When any public officer, civil or military, shall have done or suffered an act which, by law, shall make a forfeiture of his office."

All such actions are tried at the first term of the Court, and the remedy is very summary and complete.

The Code, sec. 616.

But if this is not true, the plaintiff was certainly entitled to relief somewhere from the arbitrary action of the Governor. And the *quo warranto* instituted to test the right was the appropriate place.

4. The opinion below recognizes the definition in *Leeper* v. *Texas*, 139 U. S., 462, 467: "Law, in its regular course of administration through *courts of justice*, is due process, and when secured by the law of the State the constitutional requirement is satisfied, and that due process is so secured

by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."

Yet here law has never been administered through any court. An executive officer passes sentence, and the courts refuse to review his action. And if the construction of the State Court that although the statute anthorizes the Governor to remove for cause, he may remove without evidence and therefore without cause, and still the courts cannot inquire into his action—if this does not subject the individual to the arbitrary action of the powers of government, plain English words have lost their meaning.

5. The opinion cites approvingly *Kennard* v. *Louisiana*, 92 U. S., 480. But there the plaintiff in error had a trial in Court, with an appeal to the Supreme Court.

"From this it appears that ample provision has been made for the trial of the contestants before a *court of competent jurisdiction;* for bringing the party against whom the proceeding is had before the Court, and notifying him of the case he is required to meet; for giving him an opportunity to be heard in his defense; for the deliberation and judgment of the Court; for an appeal from this judgment to the highest Court of the State, and for hearing and judgment there. A mere statement of the facts carries with it a complete answer to all the constitutional objections urged against the validity of the Act. The remedy was certainly speedy, but it could only be *enforced* by means of orderly proceedings in a court of competent jurisdiction in accordance with rules and forms established for the protection of the rights of the parties."

There the burden of proof was placed upon the plaintiff in error by the statute. Not so here. There was given by the statute provision for a notice, returnable in twenty-four hours. No provision for notice is in our statute. This, of itself, is held by some courts to vitiate the statute.

Stuart *v.* Palmer, 74 N. Y., 183.
Kuntz *v.* Sumption, (Ind.), 2 L. R. A., 655.
Del Castillo *v.* McConnico, 18 Sup. Ct. Rep., 229.

There was no opportunity for the deliberation of the Court. For in the absence of evidence there was nothing to deliberate upon. There was no opportunity for appeal.

6. The opinion and the brief of defendant in error seem to labor under the idea that the plaintiff in error claims that the Federal Constitution entitles him to a jury trial. No such contention is or has been made. But we say that he is entitled to a trial in a court of justice. This right is guaranteed to him by the Fourteenth Amendment, as I have endeavored to show.

7. But it is argued that the defendant accepted office with notice of the provisions in the statute, or subject to those conditions; and that these provisions are part of the contract. But the defendant accepted his office with notice also of the higher law contained in the Constitution. He accepted with notice that the Constitution controlled the statute and blotted from the contract every clause inconsistent with its terms. An enactment which is opposed to the Constitution is void—it is no law at all.

Cooley Const. Lim., 4.
Houston *v.* Bogle, 10 Ired. (32 N. C.), 496.

Not every condition in a contract is capable of enforcement. A promise in a note or mortgage to pay usurious interest is a condition of the contract, but it is not enforced by the courts. A might promise B to pay him one hundred dollars for a horse in one year's time, but if, in the meantime, A shall slay B's enemy or burn his barn, the amount shall be reduced to fifty dollars. No Court would enforce such an agreement. So no Court can enforce unconstitutional provisions.

So an agreement in a policy of insurance to determine by arbitration only the amount of damages is valid, but an agreement which prevents a party from coming into a court

of law—*which ousts the courts of their jurisdiction*—cannot be supported.

Manufacturing Co. *v.* Assurance Co., 106 N. C., 28, and cases cited.

Hamilton *v.* Insurance Co., 136 U. S., 242.

Moreover, the plaintiff in error contracted that if he were guilty of the things alleged against him, the Governor might suspend, but he did not contract to shun the courts of his country and abide by the arbitrary edict of the Governor, guilty or not guilty; nor did he ever contract that he would not ask a trial or seek to reverse arbitrary action.

Where the State Court held that there could be no inquiry as to the reasonableness of rates established by a Railroad Commission, it was said: "This being the construction of the statute by which we are bound in considering the present case we are of the opinion that, so construed, it conflicts with Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor as an absolute finality the action of a Railroad Commission which, in view of the powers conceded to it by the State Court, cannot be regarded as clothed with judicial functions or possessing the machinery of Courts of justice."

Chicago &c. R. Co. *v.* Minnesota, 134 U. S., 418 (per Blatchford, J.)

So in the present case, James W. Wilson is practically deprived of his office, no matter how the General Assembly rules. For it convenes about the first of January, 1899, and lasts sixty days; and Wilson's term expires on the 1st of April, 1899.

"As the Courts will not interfere with the action of the

Legislature, so it may rightfully be presumed that the Legislature never intends to interfere with the action of the Courts, or to assume judicial functions to itself. It may be presumed to have left to the Courts the redress of the private wrongs done by the Omaha Company. * * * If the disabled condition of the Postage Company has been brought about by the wrongs of the Omaha Company, the Courts are open, and the accepted maxim in those thribunals is, that where there is a wrong there is a remedy. It thus subserves the interests of the public and leaves the redress of the wrong to that department which has not only the requisite jurisdiction, but also the appropriate machinery for ascertaining the amount of injury, and enforcing the due compensation."

Angle *v.* Chicago &c. Railway, 151, U. S., 1, 20, 21.

It is worthy of note that the very section of the Constitution of North Carolina under which the Railroad Commission was established, (Art. 4, Sec. 12) begins "The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government."

V.

The Statute and the action of the Governor violate the Fourteenth Amendment to the Constitution of the United States, in that it deprives the plaintiff in error of the equal protection of the laws.

Every man has a right to be tried by the courts of his country. Nowhere in this statute is there mention of a court. Nowhere is there an opportunity to try the question of guilt or innocence by any judicial officer. The executive deprives him of his property in the first instance, and the legislature may do so in the second. See the striking remarks of Pearson, C. J., in *Barnes* v. *Barnes*, *supra*.

No such provision of law is applicable to any other men in the land. No body else is deprived of a trial by the courts.

The sections of the Constitution of North Carolina bearing on the question are as follows:

"The legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other."

Const., Art. 1, Sec. 8.

"The Executive Department shall consist of a Governor, in whom shall be vested the supreme executive power of the State," etc.

Const., Art. 3, Sec. 1.

"The judicial power of the State shall be vested in a court for the trial of Impeachments, a Supreme Court, Superior Courts, Courts of Justices of the Peace, and such other Courts inferior to the Supreme Court, as may be established by law."

Const., Art. 4, Sec. 2.

"The General Assembly shall have no power to deprive the Judicial Department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government; but the General Assembly shall allot and distribute that portion of this power and jurisdiction, which does not pertain to the Supreme Court, among the other courts prescribed in this Constitution, or which may be established by law, in such manner as it may deem best; provide also a proper system of appeals; and regulate by law when necessary the methods of proceeding in the exercise of their powers, of all the courts below the Supreme Court, so far as the same may be done without conflict with other provisions of this Constitution."

Const., Art. 4, Sec. 12.

The whole theory of our government is opposed to the wiping out of the line of demarcation between ministerial powers and judicial powers—also between legislative powers and judicial powers. The founders of our Constitution never contemplated that the courts of the land should sit dumb

and powerless in the midst of controversies respecting vested rights of property and sacred privileges of citizenship.

"A principle and guarantee of liberty, so acknowledged and common with the Anglican people that few think of its magnitude, yet of really organic and fundamental importance, is the division of government into three distinct functions, or rather the keeping of these functions clearly apart. It is, as has been mentioned, one of the greatest political blessings of England, that from a very early period her courts of justice were not occupied with 'administrative business,' for instance, the collection of taxes, and that her parliament became the exclusive legislature, while the parliaments of France united a judicial, legislative and administrative character. The union of these functions is absolutism, or despotism on the one hand, and slavery on the other, no matter in whom they are united, whether in one despot or in many, or in the multitude, as in Athens after the time of Cleon the tanner. The English political philosophers have pointed out long ago the necessity of keeping the three powers separate in a 'constitutional' government. Those, however, who have no other definition of liberty than that it is equality, discard this division, except, indeed, so far as mere convenience of transacting business would require."

Lieber's Civil Liberty and Self Government, 150.

"Power, according to its inherent nature, goes on increasing until checked. The reason is not that power is necessarily of an evil tendency, but because without it, it would not be power. Montesquieu says: 'It is the lasting experience that every man, who has power, is brought to the abuse of it. He goes on until he finds its limits.' And so it is with 'every man,' because it lies in the very nature of power itself."

Ibid., 152.

Said Mr. Webster (Works, Vol. 4, p. 122): "Every free

government is necessarily complicated, because all such governments establish restraints, as well on the power of government itself as on that of individuals. If we will abolish the distinction of branches, and have but one branch; if we will abolish jury trials and leave all to the judge; if we will then ordain that the legislator shall himself be that judge; and if we place the executive power in the same hands, we may readily simplify government, we may easily bring it to the simplest of all possible forms, a pure despotism. But a separation of departments, so far as practicable, and the preservation of clear lines of division between them, is the fundamental idea in the creation of all our constitutions; and, doubtless, the continuance of regulated liberty depends on maintaining these boundaries."

"The independence of the law or administration of justice requires the independence of the judge. All the guaranties we have mentioned support the judge in his independence, and are requisite for it. He cannot be so without a distinct separation of the judiciary from the other branches of the government, without a living, self sustaining justice, or without the accusational procedure."

Lieber's Civil Liberty and Self-Government, 220.

"The law is not independent, and consequently the citizen is not free, where aught else than the administration of justice belongs to the Court, and where anything that belongs to the administration of justice is decided by any one but the courts; where things are decided by aught else than the natural course of law, and where, as has been stated, interpretation or application belongs to any one else than to the judiciary."

Ibid., 220.

Said Mr. Hamilton, Federalist, No. 78, p. 356: "This simple view of the matter suggests several important consequences; it proves incontestibly that the judiciary is beyond

comparison the weakest of the three departments of power; that it can never attack with success either of the other two, and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves that though indvidual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter: I mean so long as the judiciary remains truly distinct from both the legislature and executive. For I agree that 'there is no liberty if the power of judging be not separated from the legislative and executive powers.' It proves, in the last place, that as liberty has nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments, that as all the effects of such an union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed or influenced by its co-ordinate branches; that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and in a great measure, as the citadel of the public justice and the public security."

Again, on p. 361 (No. 79), he says: "Next to permanency in office, nothing can contribute more to the independence of the judges than the fixed provision for their support. The remark made in relation to the president is equally applicable here. In the general course of human nature, a *power over a man's subsistence amounts to a power over his will*, and we can never hope to see realized in practice the complete separation of the judicial from the legislative power in any system which leaves the former dependent for pecuniary resource on the occasional grants of the latter."

That the Railroad Commissioners are judges of a court of

record under the power conferred in Art. 4, Secs. 2, 12 and 30, has been expressly settled.

Express Co. *v.* Railroad Co., 111 N. C., 463.
Railroad Co. *v.* Tel. Co., 113 N. C., 213.
Leavell *v.* Tel. Co., 116 N. C., 211.
Laws 1891, Ch 498.

Being judges under the power conferred in the Constitution, they come under Const., Art. 4, Sec. 31, which empowers the General Assembly upon a concurrent resolution of two-thirds of both houses to remove them and any other judges of the State "for mental or physical inability." But by this mode of proceeding they alone of all the judges of the State are removable by the Governor and the Legislature, without a trial. For no method of trial is prescribed.

This, then, is a denial of the equal protection of the laws.

See Yick Wo *v.* Hopkins, 118 U. S., 356, 369, 370, 373.
Cooley's Con. Lim., 485, 486.
Gulf, etc., R. Co. *v.* Ellis, 165 U. S., 150, 155, 160.

But so much that is cited under the due process discussion, is also pertinent on this subject that I need not pursue the matter further. The peculiar doctrine of North Carolina as to an officer's contract rights and his property rights in his office will be found stated in Wood *v.* Bellamy, 120 N. C., 212; Hoke *v.* Henderson, 4 Dev., 1; Cotten *v.* Ellis, 7 Jones, 545; King *v.* Hunter, 65 N. C., 603.

On the point of the judicial character of the Governor's action I desire to add these authorities: Mechem Pub. Officers, sec. 455; State *v.* Pritchard, 36 N. J. L., 101; Arkle v. Board Commissioners, (W. Va.) 23 S. E. Rep., 804; Speed *v.* Com. Council, 98 Mich., 360 (39 Amer. St. Rep., 555); Board Coms. *v.* Johnson, 124 Ind., 145 (19 Amer St. Rep. 88); State *v.* Harrison, 113 Ind., 234; Cooley Cons. Lim., 109–111.

In conclusion, I respectfully submit that there is no warrant whatever for the contention that this is a frivolous or

dilatory resort to this Court. On the contrary, the case of the defendant in error is utterly without support under the principles of constitutional government which our fathers have handed down to us and under which we have lived.

R. O. BURTON,
Attorney for the Plaintiff in Error.

Note:- After this brief was in type, my attention was called to Del Castillo v. Mc Connico, 18 Sup. Court Rep. 229, decided by this Court Jany. 3rd, 1898. The case clearly shows that due process must be found in the State statute and that to determine its existence is the final province of this Court. This paramount obligation being fulfilled, as to other matters the State interpretation of its own law is controlling.

No. 558.

Sup. Br. of Burton for P. E. (me

FILED
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JAMES H. McKENNEY
CLERK

No. 558.

Filed Feb. 21, 1898.

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1898.

J. W. WILSON, PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA, ON RELATION OF L. C. CALDWELL.

Supplemental Brief for the Plaintiff in Error, on the Motion to Dismiss or Affirm.

In connection with pp. 17 and 18 of my brief, I desire to add: The practice in England before the Declaration of Independence is well shown by 5 Com. Dig., Title Officer (K 12), where divers cases are collected.

In the case in 9 Co., 98a (Sir George Reynel's case), it was also resolved, that forasmuch as the office was found by force of a commission under the great seal, and returned in this Court (K. B), that (although the office be to be executed in another Court) yet the award of the seisin shall be in this Court, where the office is returned, and in this Court the party shall have his traverse, or *monstrans de droit*, as his case is, to avoid the office.

The record of Mark Steward's case is set out in full (9 Coke, 99b—104a), by which it appears that after office found in Chancery, an issue was awarded and a special verdict found by the jury; and Steward was restored to his office.

When there was office found or an inquisition, the party aggrieved had his remedy either by *petition de droit*, or petition of right, or *monstrans de droit* (manifestation or plea of right), both of which could be preferred in the Chancery or Exchequer; and by Statute of 36 Edw. 3d, and 2 and 3 Edw. 6, inquisitions of office could be traversed.

3 Black. Com., *256, *260.

In *Rex* v. *Mayor of Doncaster*, a capital burgess was restored to his office.

2 Ld. Raym., 156, 4.

So in *Rex* v. *Mayor of Doncaster* an alderman was restored.

Sayers, 37.

See also Queen *v.* Guy, 6 Mod., 89.

In Baggs's case it was resolved that to the King's Bench belongs authority, not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to the breach of peace, or oppression of the subjects, or to the raising of faction, controversy, debate, or to any manner of government; so that no wrong or injury, either public or private, can be done, but that it shall be (here) reformed or punished by due course of law.

11 Co., 98a.

In *The King* v. *The Warden of the Fleet*, 3 Mod. Rep., 335, an inquisition to seize the office of Warden of the Fleet into the King's hands was quashed in the Court of Chancery, assisted by three judges, because it did not find (1) the estate of the party offending; (2) a cause of forfeiture.

See also Manlove's case, 3 Levinz, 288; 3 Salk., 469.

In *Rex* v. *Stirling*, Sayer's Rep., 174, a peremptory mandamus was issued to the vicar to restore a parish clerk, because the office being *prima facie* for life, Hall had a freehold therein unless the vicar had a power of appointing thereto during pleasure, which did not appear. It was said the return must be in such precise terms, that the truth may be tried in an action for a false return; or, if the cause returned be admitted, the Court may be able to judge of the goodness thereof.

"It not appearing that the party has any redress by applying to another Court, this Court will relieve him, if he has been proceeded against and defrauded, without being heard, which is contrary to natural justice."

Rex *v.* Cambridge, 2 Ld. Ray 1334, 1348.

"It is the glory and happiness of our excellent constitution that to prevent any injustice no man is to be concluded by the first judgment; but that if he apprehends himself to be aggrieved, he has another Court to which he can resort for relief; for this purpose the law furnishes him with appeals, with writs of error and false judgment, and lest in this particular case the party should be remediless, it was become absolutely necessary for this Court to require the University to lay the state of their proceedings before us; that if they have erred the party may have right done him, or if they have acted according to the rules of law, that their acts may be confirmed."

Parker, C. J., in Rex *v.* Cambridge, 1 Strange, 565.

R. O. BURTON,
Of Counsel for Plaintiff in Error.

Raleigh, N. C.

WILSON *v.* NORTH CAROLINA.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 558. Submitted January 17, 1898. — Decided March 21, 1898.

Chapter 320 of the Laws of North Carolina of 1891 was a valid law, and the action of the Governor of the State under it in suspending the plaintiff in error as railroad commissioner, appointed under it, was, as construed by the Supreme Court of that State, a valid exercise of the power conferred upon the Governor by that act, and was due process of law, within the meaning of the Constitution.

The Federal question which is attempted to be raised in this case is unfounded in substance, and does not really exist.

The judgment of the state court in this case operated of itself to remove the plaintiff in error from the office of railroad commissioner, and there is no foundation in the evidence for the allegation that his successor knew of the filing of the supersedeas bond when he took possession of the office, or was guilty of contempt in doing so.

Two motions were made in this case. The defendant in error made a motion to dismiss the writ on the ground of want of jurisdiction. The plaintiff in error obtained from this court a rule against the relator Caldwell to show cause why he should not be punished as for a contempt in proceeding upon the judgment of the state court after a writ of error from this court had been allowed and a supersedeas bond duly filed. The two motions were heard together. The following were the facts presented upon the motion to dismiss:

By chapter 320, of the laws of 1891, the general assembly of North Carolina passed an act creating a state railroad commission, the first section of which is set out in the margin.[1]

[1] "There shall be three commissioners elected by the general assembly to carry out the provisions of this act. . . . Said commissioners shall not jointly, or severally, or in any way, be the holder of any stock or bond, or be the agent or attorney or employé of any such company, or have any interest in any way in such company, and shall so continue during the term of his office, and in case any commissioner shall as distributee or legatee, or in any other way, have or become entitled to any stock or bonds or

Statement of the Case.

At the same session the legislature passed another act making such commission a court of record.

Under the authority of the first mentioned act, James W. Wilson, the plaintiff in error, was elected railroad commissioner by the general assembly of 1893, for the term ending April 1, 1899, and he duly qualified and entered upon the discharge of his duties as such railroad commissioner.

On the 24th of August, 1897, the Governor sent a communication to the plaintiff in error, in which, after stating that it had been charged that he had been guilty of a violation of the act above mentioned, and giving the particulars regarding such violation, the Governor directed him to show cause on a day named, at the office of the executive, in Raleigh, why he should not be suspended from office, and a report thereof made to the next general assembly according to law, and he was directed on the return day of the notice to make answer and proofs in writing and to be present in person or by counsel, at his election.

On the return day the plaintiff in error appeared and denied in writing the various charges contained in the Governor's communication, after which, in explanation of the charges, he made a written statement in regard to them. The plaintiff in error demanded of the Governor that the evidence against him be produced and that he have an opportunity to confront

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interest therein of any such company he shall at once dispose of the same; and in case any commissioner shall fail in this, or in case any one of them shall become disqualified to act, then it shall be the duty of the governor to suspend him from office and to report the fact of his suspension, together with the reason therefor, to the next general assembly, and the question of his removal from office shall be determined by a majority of the general assembly in joint session. In any case of suspension the governor shall fill the vacancy, and if the general assembly shall determine that the commissioner suspended shall be removed, then the appointee of the governor shall hold until his successor is elected and qualified as hereinbefore provided, but if the general assembly shall determine that the suspended commissioner shall not be removed from his office, then the effect shall be to reinstate him in said office. The person discharging the duties of said office shall be entitled to a salary for the time he is so engaged, but a commissioner who is suspended shall be allowed the salary during his suspension in case he should be reinstated by the next general assembly."

his accusers and cross-examine the witnesses. This demand was refused.

After receiving the answer and explanation of the plaintiff in error, and after hearing him upon the return day, the Governor subsequently and on the 23d of September, 1897, sent him a written notice, in which he said to the plaintiff in error "that you have not only violated said act in the specification set out in said act, but that you have otherwise, within the meaning and intent and words of said act, become disqualified to act." The Governor, therefore, assuming to proceed under the statute, further informed the plaintiff in error that he thereby suspended him "from the office of railroad commissioner and chairman of said commission, such suspension to continue until the question of your removal or restoration shall be determined by a majority of the general assembly in joint session. The fact of your suspension, together with the reasons therefor, and the evidence, documents and information connected therewith, will be reported to the next general assembly. You will further take notice that under and by virtue of the powers conferred and duties imposed by law upon the chief executive I have appointed L. C. Caldwell, Esq., of the county of Iredell, to fill the vacancy created by your suspension. Inasmuch as you are understood to deny the power of the executive to suspend you from office, as provided by the statutes, I have requested Mr. Caldwell to make demand upon you for the possession of the office and upon your refusal, to bring action therefor to the end that the title to the office may be judicially determined.

"D. L. Russell, *Governor.*"

The plaintiff in error in reply to the communication of the Governor sent him the following letter:

"Raleigh, N. C., *September* 24, 1897.

"To D. L. Russell, *Governor.*

"Sir: Yours of the 23d inst. is hereby acknowledged. In reply I will say that I shall disregard your order to suspend, but will continue to do business at the old stand until

removed by a tribunal other than a self-constituted 'star chamber.'

"JAS. W. WILSON,
"*Chairman Railroad Commission.*"

Mr. Caldwell duly qualified as railroad commissioner, and thereupon demanded that the plaintiff in error should surrender the office, papers, records, etc., to him, which the plaintiff in error refused to do. Mr. Caldwell then obtained leave from the attorney general to bring this action in the nature of a *quo warranto* to test the title to the office. In the complaint the foregoing facts are set forth and a judgment asked determining the title to the office to be in relator and granting him judgment for the possession thereof.

The defendant below served an answer, in which it was admitted that the Governor undertook or attempted to suspend the defendant from his office, and that he designated the plaintiff, the relator, for the vacancy which he had attempted to create, and that the relator had taken the oath prescribed by law for railroad commissioner. It was also admitted that the defendant refused to vacate his office or to surrender the same to the relator, and the defendant alleged that he was advised that his suspension was illegal, and that he was still entitled to discharge the duties of his office. He also set up that by an act of the general assembly of the State the railroad commission had been constituted a court of record inferior to the Supreme Court, to be known as the board of railroad commissioners, and with general jurisdiction as to all subjects embraced in the act creating the commission. Being a judge of a court of record, the defendant alleged that the Governor had no constitutional power to suspend him.

The answer then set forth the proceedings already mentioned, resulting in the suspension of the defendant by the Governor, and it also set forth the various demands made by defendant before the Governor, to be confronted with witnesses and to have an opportunity to cross-examine them, and the Governor's refusal of those demands, and as a result the

defendant alleged that the Governor had without evidence and without trial found that the defendant had violated the law, and had become disqualified to act as railroad commissioner, and that he had, without a more specific finding, assumed to suspend the defendant and deprive him of his office.

The defendant also alleged in his answer that the action of the Governor was taken in violation of the Fourteenth Amendment of the Constitution of the United States.

Upon these pleadings the action came on for trial, and the record states that "at the conclusion of the reading of the pleadings the defendant tendered the following issues and demanded a trial by jury:

"1. Is the plaintiff entitled to the office of railroad commissioner?

"2. Does the defendant unlawfully intrude into, hold and exercise the office of railroad commissioner and chairman of said commission?

"3. Has the defendant acquired any interest in any way in the Southern Railway Company in violation of law?

"4. Has the defendant become disqualified to act as a fair judge or commissioner, or has he become in any way disqualified to act?

"5. Did the defendant prior to September 1, 1897, sell and convey for a valuable consideration the Round Knob Hotel to R. M. Brown?

"6. Did the defendant demand of the Governor that the evidence against him be produced and that he have an opportunity to confront his accusers and cross-examine the witnesses against him?

"7. Was said demand refused?

"8. Was any evidence produced?"

The court refused to submit these questions to the jury and the defendant excepted.

The plaintiff thereupon moved for judgment upon the complaint and answer. The defendant objected that the motion was irregular and that the plaintiff should either demur or go to trial before the jury, and that the statute in question and the action of the Governor, set out in the pleadings, deprived

defendant of his office without due process of law and denied to him the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, the protection of which he expressly claimed.

The court ruled that the plaintiff was entitled to judgment upon the pleadings, which judgment was thereupon rendered, and the defendant excepted and appealed to the Supreme Court of the State. After argument that court adjudged that the defendant had been lawfully suspended from the office of railroad commissioner; that the relator had been duly appointed to fill the vacancy thus created, and that the defendant should be ousted from and the relator inducted into that office. Judgment to that effect was accordingly entered. The defendant then sued out a writ of error from this court, which was allowed. The two motions were then made, one to dismiss the writ of error, and the other to punish the defendant as for contempt.

Mr. R. O. Burton for plaintiff in error.

Mr. James C. McRae, *Mr. W. H. Day* and *Mr. A. C. Avery* for defendant in error.

Mr. Justice Peckham, after stating the case, delivered the opinion of the court on the motion to dismiss.

A consideration of the facts convinces us that the motion to dismiss this writ of error for lack of jurisdiction ought to be granted.

Under the statute of 1891, creating the railroad commission and providing for the appointment, suspension and removal of the officers of such commission, the act of the Governor in suspending the plaintiff in error was not a finality. Before there could be any removal, the fact of suspension was to be reported to the next legislature by the Governor, and unless that body removed the officer the effect was to reinstate him in office, and he then became entitled to the salary during the time of his suspension.

In speaking of the statute and the purpose of this particular provision the Supreme Court of the State said: "The duty of suspension was imposed upon the Governor from the highest motives of public policy to prevent the danger to the public interests which might arise from leaving such great powers and responsibilities in the hands of men legally disqualified. To leave them in full charge of their office until the next biennial session of the legislature, or pending litigation which might be continued for years, would destroy the very object of the law. As the Governor was, therefore, by the very letter and spirit of the law, required to act and act promptly, necessarily upon his own findings of fact, we are compelled to hold that such official action was, under the circumstances, due process of law. Even if it were proper, the Governor would have no power to direct an issue like a chancellor."

The highest court of the State has held that this statute was not a violation of the constitution of the State; that the hearing before the Governor was sufficient; that the office was substantially an administrative one, although the commission was designated, by a statute subsequent to that which created it, a court of record; that the officer taking office under the statute was bound to take it on the terms provided for therein; that he was lawfully suspended from office; and that he was not entitled to a trial by jury upon the hearing of this case in the trial court. As a result the court held that the defendant had not been deprived of his property without due process of law, nor had he been denied the equal protection of the laws.

The controversy relates exclusively to the title to a state office, created by a statute of the State, and to the rights of one who was elected to the office so created. Those rights are to be measured by the statute and by the constitution of the State, excepting in so far as they may be protected by any provision of the Federal Constitution.

Authorities are not required to support the general proposition that in the consideration of the constitution or laws of a State this court follows the construction given to those instruments by the highest court of the State. The exceptions to

this rule do not embrace the case now before us. We are, therefore, concluded by the decision of the Supreme Court of North Carolina as to the proper construction of the statute itself, and that as construed it does not violate the constitution of the State.

The only question for us to review is whether the State, through the action of its Governor and judiciary, has deprived the plaintiff in error of his property without due process of law, or denied to him the equal protection of the laws.

We are of opinion the plaintiff in error was not deprived of any right guaranteed to him by the Federal Constitution, by reason of the proceedings before the Governor under the statute above mentioned, and resulting in his suspension from office.

The procedure was in accordance with the constitution and laws of the State. It was taken under a valid statute creating a state office in a constitutional manner, as the state court has held. What kind and how much of a hearing the officer should have before suspension by the Governor was a matter for the state legislature to determine, having regard to the constitution of the State. The procedure provided by a valid state law for the purpose of changing the incumbent of a state office will not in general involve any question for review by this court. A law of that kind does but provide for the carrying out and enforcement of the policy of a State with reference to its political and internal administration, and a decision of the state court in regard to its construction and validity will generally be conclusive here. The facts would have to be most rare and exceptional which would give rise in a case of this nature to a Federal question.

Upon this subject it was said, in the case of *Allen* v. *Georgia*, 166 U. S. 138, 140, as follows: "To justify any interference upon our part it is necessary to show that the course pursued has deprived, or will deprive, the plaintiff in error of his life, liberty or property without due process of law. Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State had acted in consonance with the constitutional

laws of a State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."

This statement is quoted with approval in *Hovey* v. *Elliott*, 167 U. S. 409, 443.

No such fundamental rights were involved in the proceedings before the Governor. In its internal administration the State (so far as concerns the Federal Government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the person filling the office. And in such matters the decision of the state court, that the procedure by which an officer has been suspended or removed from office was regular and was under a constitutional and valid statute, must generally be conclusive in this court.

In *Kennard* v. *Louisiana*, 92 U. S. 480, the proceeding under which the title to the office of Justice of the Supreme Court of the State was tried, was held not to violate the Fourteenth Amendment of the Constitution of the United States. The court said the officer had an opportunity to be heard before he was condemned. There was no intimation in that case that a hearing such as was had here would be insufficient or that the officer would be entitled to be "confronted with his accusers and to cross-examine the witnesses," and to have a jury trial. In *Foster* v. *Kansas*, 112 U. S. 201, the *Kennard case* was approved. Neither case gives any support to the claim that such a hearing as was given in this case would be insufficient under the Fourteenth Amendment.

Nothing in that amendment was intended to secure a jury trial in a case of this nature.

The demand made by the plaintiff in error for such a trial in the court below must have been for the purpose of submitting to the jury the question of the truth of the allegations

set up in the answer regarding the proceedings before the Governor, and to claim that if the jury found them to be true, he was not legally suspended. But the motion for judgment on the pleadings was equivalent to a demurrer to the answer for insufficiency, and was, therefore, an admission of all the facts well pleaded. The question then became one of law for the court to decide, and in granting the motion the court did decide that no defence was set forth in the answer. In a case like this, such a decision of the state court is conclusive. The mere refusal of a jury trial, in and of itself and separated from all other matters, raises no Federal question. *Walker* v. *Sauvinet*, 92 U. S. 90.

In the proceeding for trying the title to office in the case of *Kennard* v. *Louisiana*, 92 U. S. 480, the statute provided for a hearing without a jury, and this court held it was not objectionable for that reason.

Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law or by denying him the equal protection of the laws.

In *Hamblin* v. *Western Land Company*, 147 U. S. 531, it was stated that "a real, and not a fictitious, Federal question is essential to the jurisdiction of this court over the judgments of state courts. *Millingar* v. *Hartupee*, 6 Wall. 258; *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, 87. In the latter case it was said that 'the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay.'"

We think this case falls within the principle thus stated. Although an office has been held in North Carolina to be generally and in a certain restricted sense the property of the incumbent, yet in this case the Supreme Court held that the

incumbent, in taking the office, holds its subject to the act creating it, which binds him by all its provisions, all of which were held to be valid. We should be very reluctant to decide that we had jurisdiction in such a case, and thus in an action of this nature to supervise and review the political administration of a state government by its own officials and through its own courts. The jurisdiction of this court would only exist in case there had been, by reason of the statute and the proceedings under it, such a plain and substantial departure from the fundamental principles upon which our government is based that it could with truth and propriety be said that if the judgment were suffered to remain, the party aggrieved would be deprived of his life, liberty or property in violation of the provisions of the Federal Constitution.

We are of opinion that the facts herein present no such case, and that the jurisdiction of this court does not extend to the case as made in the record now before us.

For these reasons the motion of the defendant in error to dismiss this writ should be granted, and the writ is accordingly

Dismissed.

The following are the facts upon the motion to punish defendant in error as for a contempt:

The plaintiff in error, after the entry of the judgment of the Supreme Court affirming the judgment of ouster, sued out a writ of error from this court, which was duly allowed by the Chief Justice of the Supreme Court of that State on the 23d day of December, 1897, and on the same day a good and sufficient bond, conditioned as required by law in cases of supersedeas, was tendered, and the Chief Justice duly approved it and signed the citation. A few minutes after seven o'clock in the afternoon of that day the writ of error with the petition therefor and the assignment of errors and the citation and bond were filed in the clerk's office of the state Supreme Court, and at the same time copies of the writ of error were lodged in the clerk's office, for the State of North Carolina and for the relator. The plaintiff in error alleged, on informa-

tion and belief, that the relator, with full knowledge of the issuing of the writ and of the action of the Chief Justice, broke into the room occupied as offices by the railroad commission and took possession. The judgment of affirmance directed the issuing of a writ of possession. On the morning of the 24th of December, 1897, counsel for the relator made a motion in the state court to set aside the supersedeas, while at the same time counsel for the plaintiff in error made a motion that the execution of the writ of possession issued on the judgment of the state court be recalled on account of the supersedeas. Both motions were refused, and an opinion delivered by Mr. Justice Clark holding that the judgment of the court *ex proprio vigore* placed the relator in the possession of the office at the time the judgment was filed, and that such judgment took effect immediately upon being entered, and it was not superseded by the subsequent writ of error, regular or irregular. He also held that the court had no power to set aside the writ of error or to pass upon the regularity thereof.

The relator made answer under oath. He alleged that after the judgment of the Supreme Court of North Carolina was rendered, and pursuant to its directions, a writ was issued out of that court at half-past five o'clock of that day, and was immediately placed in the hands of the sheriff, and that the sheriff went to the offices of the railroad commission for the purpose of executing the writ, but that the plaintiff in error could not be found, and that he was absent from the county and State for the purpose, as alleged, of avoiding service of the writ; that the doors of the commission's rooms were locked, and the sheriff left the building for the purpose of getting keys or other means of entry, but did not return, and that the relator, after waiting a reasonable time for the return of the sheriff and being advised by counsel that he had good right in law so to do, procured the door of the room to be opened, and he then entered therein and assumed to exercise the duties of the office of railroad commissioner.

He denied under oath that any notice of the filing of a supersedeas by the plaintiff in error was served upon him, or that he had any knowledge of the filing of said bond until

the day after the taking possession of the rooms of the commission as above stated.

Mr. Justice Peckham, after stating the above facts, delivered the opinion of the court on the motion to punish for contempt.

Plaintiff in error claims that by virtue of the allowance of the writ of error and the filing of the supersedeas bond, the relator was precluded from taking any step under the judgment of the state court, which ousted the plaintiff in error and adjudged the right to the office to be in the relator. It is argued that the filing of a proper bond operates as a supersedeas of the judgment in an action in the nature of a *quo warranto*, as well as in any other action. *United States, ex rel. Crawford* v. *Addison*, 22 How. 174. In that case Addison held the office of mayor of the city of Georgetown. Proceedings in the nature of *quo warranto* were commenced against him by the United States on the relation of Crawford. Upon the trial of the action judgment of ouster was entered against the defendant. A writ of error from this court was sued out by him and a sufficient bond was filed. The relator applied to this court for a peremptory writ of mandamus to be directed to the judges of the Circuit Court of the District of Columbia commanding them to execute the judgment of that court by which Addison had been ousted and the relator adjudged entitled to the office. This court denied the motion, and decided that after a writ of error had been sued out from this court and the proper bond filed further proceedings were stayed in the court below. It was not a case where immediately upon the entering of the judgment of ouster the court had directed the possession of the office to be taken by the relator, who had taken possession accordingly. The court was asked to actively intervene to put the relator in possession of the office, notwithstanding the allowance of a writ of error and the filing of a bond. The court refused to do so, holding that the supersedeas bond stayed further proceedings under the judgment.

Opinion of the Court.

In *Foster* v. *Kansas*, 112 U. S. 201, the attorney general of Kansas had instituted a proceeding to remove Foster, the plaintiff in error, from the office of county attorney for Saline County. The Supreme Court of Kansas rendered judgment on the 1st of April, 1884, removing Foster, and, under a statute of the State making it his duty so to do, the judge of the district court of Saline County, upon being presented with an authenticated copy of the record of the Supreme Court which removed Foster, duly appointed Moore to such office, and approved his bond on the 7th of April. A writ of error from this court had been allowed in Washington on the 5th of April, and the supersedeas bond approved and citation signed. Although notice of these facts was telegraphed on the same day from Washington to counsel in Kansas, who immediately exhibited the telegram to the judge of the district court, and notified him of what had been done in Washington, yet neither the writ of error nor the supersedeas bond arrived from Washington until the 8th of April, on which day they were duly lodged in the office of the clerk of the Supreme Court of the State. Moore, the appointee of the district judge, thereafter appeared as county attorney, and a rule was therefore granted requiring him to appear before this court and show cause why he should not be adjudged in contempt for violating the supersedeas. This court, after argument, held that he was not in contempt, and that the supersedeas was not in force when Moore was appointed to and accepted the office. The court said: "The judgment operated of itself to remove Foster and leave his office vacant. It needed no execution to carry it into effect. The statute gave the judge of the district court authority to fill the vacancy thus created. The judge was officially notified of the vacancy on the 7th, when the authenticated copy of the record of the Supreme Court was presented to him. The operation of that judgment was not stayed by the supersedeas until the 8th, that being the date of the lodging of the writ of error in the clerk's office. It follows that the office was in fact vacant when Moore accepted his appointment, gave his bond and took the requisite oath. He was thus in office before the supersedeas became

operative. What effect the supersedeas had, when it was afterwards obtained, on the previous appointment, we need not consider. This is not an appropriate form of proceeding to determine whether Foster or Moore is now legally in office." The rule was therefore discharged.

In this case it is also true that the judgment operated of itself to remove the plaintiff in error. The judgment also adjudged the title to the office to be in the relator. After the filing of the supersedeas bond it may be assumed that further action under the judgment was stayed. The question is whether the relator is shown to be guilty of a contempt in proceeding to take possession after he knew of the filing of the bond. He swears unequivocally that he was ignorant of the fact of the allowance of a writ or the filing of the bond at the time when he took possession of the room occupied by the commission, and that he was not informed of that fact until some time the next day. We think this a sufficient answer to the case as it is now presented to us, and that any further proceeding is rendered unnecessary because of our conclusion to dismiss the writ of error for want of jurisdiction. We see no evidence of any intentional contempt on the part of relator, and our conclusion is that the rule must be

Discharged.

In WILSON *v.* NORTH CAROLINA, No. 559 submitted with No. 558, the same questions are involved and the same orders are made.